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Vol. 3238

No. 18,535

IN THE

United States Court of Appeals

For the Ninth Circuit

ANTOINETTE BORNHOLDT, et al.,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

OPENING BRIEF FOR APPELLANTS

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JURISDICTION

This is an action to quiet title or, in the alternative, for damages for inverse condemnation of plaintiff's property. This action was originally filed in the Superior Court of the State of California, in and for the County of Contra Costa. Thereafter, a petition for removal from the State Court to the United States District Court for the Northern District of California, Southern Division, was filed by defendant. (R. 5.)

The District Court had jurisdiction under 28 U.S.C. 1332, as said section read on September 11, 1957, the date that Southern Pacific Company's petition for removal was filed with the District Court. (R. 5.)

The first amended complaint (R. 38) shows the defendant to be a corporation, incorporated under the laws of the State of Delaware, and also shows the amount in controversy to be in excess of $3,000.00, which was the jurisdictional minimum of the District Court at the time this action was filed.

STATEMENT OF THE CASE

The evidence which is substantially not in conflict shows that appellants' predecessor in interest, A. S. Botello and Maria Silva Botello, his wife, granted to Appellee's predecessor in interest, Southern Pacific Railroad Company, two adjacent strips of land, each being 100 feet in width. One of the strips of land, which is not the subject of this litigation, was for a portion of the railroad line between San Ramon and Avon. (R.T. 31-32. See Ex. V.) The railroad tracks for this line are located on this 100 foot strip and for purposes of this brief this strip will be referred to as the "right-of-way." By another Deed, dated August 6, 1890, (Ex. C) the provisions of which are crucial to this litigation, another 100 foot strip of land immediately adjacent to the "right-of-way" was acquired to construct the railroad station. This strip, consisting of approximately 4.04 acres, will be referred to in this brief as the "station grounds."

This Deed to the "station grounds" provided:

> "That the said parties of the first part [A. S. Botello and Maria Silva Botello] for and in con-

> sideration of the sum of One Dollars Gold Coin of the United States of America, to them in hand paid by the said party of the second part [Southern Pacific Railroad Company] the receipt whereof is hereby acknowledged, have granted, bargained and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm, unto the said party of the second part, and to its successors and assigns forever, . . ."
>
> [Here followed a description of the real property being conveyed.]

Following a description of the real property, the Deed contained the following provision:

> "Provided that if ever party of the second part, or its successors, shall cease to occupy said premises for railroad purposes, then all of the right, title and interest herein conveyed shall revert to parties of the first part, their heirs, or assigns."

A railroad was constructed on the "right-of-way" parcel between San Ramon and Avon, which railroad is still in operation. A station was constructed on the "station grounds," the location of which is shown in Exhibit 2, which is a survey of the property in dispute, together with adjacent property.

On September 23, 1952, the Appellee leased the property described in the complaint to MacDonald Products Co. (Ex. AA.) This lease will be referred to in this brief as the "Capwell Lease," since it was subsequently assigned to the Emporium-Capwell Com-

pany. (Ex. AC.) This lease was for a term of five years and contained no specific provision for its termination by anyone prior to the expiration of its five-year term. The trial Court found (R. 76) that because of the provision in the lease obligating Lessee to:

> "Observe and comply with all federal, state, county and municipal laws now in effect or hereinafter enacted with respect to the occupancy of said leased premises,"

that said lease was in fact terminable whenever use of the leased premises became necessary or desirable for Appellee to serve the public or its railroad patrons. There was introduced into evidence by the defendant substantially all of the leases that had been entered into covering parcels 1 and 2 described in the complaint, and *every* such lease, other than the "Capwell Lease" contained a provision authorizing defendant to terminate the lease on thirty (30) days' written notice. This very provision was deleted from the "Capwell Lease." (See Ex. AA through AN.)

In January of 1954, a supplemental agreement to the "Capwell Lease" was entered into (Ex. AB.) Under this supplemental agreement, Southern Pacific leased an additional strip of land immediately adjacent to the parcel in question within the original "right-of-way" grant to Capwell Company. The following clause was contained in the supplemental agreement *with respect to the additional strip of land:*

> "It is understood and agreed that notwithstanding anything contained in said lease, dated Sep-

> tember 23, 1952, the lease, with respect to the parcel of land shown on the print hereto attached, shall be subject to termination at any time by railroad by giving thirty (30) days' written notice to lessee to that effect."

The evidence shows that the Emporium-Capwell Company, the lessee under said lease, operates a major department store in Walnut Creek, as part of a large regional shopping center and has continuously used the premises in question for the public parking of automobiles. (R.T. 58-61.)

The area in dispute is a part of a large parking lot used by the Capwell Organization and this parking lot is separated from the railroad tracks by a chain link fence. (Exs. 2, and 3A through 3D.) Located within the area leased from Southern Pacific Company is a sign indicating that the H. C. Capwell Company is the owner of the property in question. (Ex. 3E.)

The Capwell Company neither receives nor ships merchandise by rail from its Walnut Creek store. (R.T. 59.) All shipments received by the company are by truck. (R.T. 62.) Some shipments are received at the Walnut Creek station which is approximately 348 feet from the edge of Capwell's parking lot. (Ex. 2, R.T. 54, line 10.) However, these are transported from the station to Capwell's by truck. (R.T. 61-62.) The portion of the parking lot in question consists of 1.139 acres, or approximately 28% of the original 4.04 acres station ground grant.

In view of the provisions in the lease authorizing its cancellation on short notice within the area of the original right-of-way grant, no claim to date has been made with respect to this portion of the parking lot.

Because of the evidence introduced with respect to parcel 2 showing that the lease was subject to short-term cancellation, and also in view of the evidence that the lessee of said parcel received substantial direct shipments by rail, any claim with respect to said parcel 2 was withdrawn upon conclusion of the submission of testimony to the trial Court. This was not intended to indicate that if the use of said parcel should change that appellants were waiving any claim to it.

The Trial Court found that appellants are the heirs of A. S. Botello and his wife, Maria Silva Botello. (R.T. 62.) The trial Court further found that: "The grantors in said deed dated August 6, 1890 and their heirs, having disposed of all their property adjoining parcel 1 described in the first amended complaint herein, do not have an enforceable right, claim or interest in the further compliance on the part of defendant or those claiming under defendant with the conditions contained in said deed." The opinion of the trial Court in supporting this finding stated (R. 70):

> "Furthermore, plaintiff's predecessor in interest, the original owners of the property, have disposed of their adjoining holdings. Under these circumstances there would be no basis for the

court to hold that plaintiffs are owners of a reversionary interest in parcel 1."

The record is clear that appellants and their predecessors in interest have disposed of all the property adjacent to the property in question. (See Exs. M through T.) All of the sales of adjacent property were by metes and bounds descriptions and the calls on these deeds were to the Southern Pacific right-of-way. (R.T. 29, lines 6 through 20.)

The appellee introduced evidence showing the activity of the Walnut Creek Station (R.T. 103-108.) Evidence was also introduced showing possible future plans for the parcel of property which is the subject of this litigation. (R.T. 64-98.)

SPECIFICATION OF ERRORS

The Court below erred:

1. In finding that the reversionary clause in question was intended by the grantors for the benefit of their lands adjoining the property described in the deed dated August 6, 1890, and their ownership interest therein.

2. In finding that parcel 1 has been used and held available by appellee and its predecessors in interest at all times mentioned for such railroad purposes as may have been needed and required.

3. In finding that the lease dated September 23, 1952, to MacDonald Products Co. was subject to

termination at any time, by appellee or by the Public Utilities Commission of the State of California, in the event that use of the leased premises should become necessary or desirable in order for the defendant or its predecessor to serve the public or railroad patrons.

4. In finding that defendant and its predecessor interest at all times have held and occupied parcel 1, described in appellants' complaint, for railroad purposes, and that they have never ceased to occupy said land for railroad purposes, and that the use of said parcel for a parking lot did not violate nor did it constitute a breach of any provision or requirement contained in said deed of August 6, 1890.

5. In concluding that appellee did not violate or breach any condition or requirement of the deed of August 6, 1890, and that appellee has not ceased to occupy the lands therein mentioned and described for railroad purposes.

6. In concluding that appellee has performed and complied with and is now performing and complying with each and every condition imposed or set forth in said deed.

7. In concluding that appellee has not forfeited its interest in and to said property or committed an inverse condemnation thereof.

8. In concluding that appellants do not have an enforceable right, claim or interest in the further compliance on the part of appellee or those claiming under appellee with the conditions contained in said deed.

SUMMARY OF ARGUMENT

1. The undisputed evidence shows that the property in question has ceased to be occupied for railroad purposes and that therefore appellants are now the owners of said real property.

2. Appellants, by conveying away all of their property on both sides of the original grant by metes and bounds descriptions, have not lost any of their rights to enforce the conditions of the Deed as to the property not so conveyed.

ARGUMENT

I

APPELLEE HAS CEASED TO OCCUPY THE PREMISES IN QUESTION FOR RAILROAD PURPOSES.

A. The Capwell Lease was for a term of five (5) years and was not subject to termination by the railroad or by the Public Utilities Commission.

The Trial Court properly recognized the principle of law that leases of railroad property which are cancellable on short notice and which do not interfere with the operation of the railroad do not violate the conditions contained in deeds similar to the condition in question.

City of Santa Monica v. Jones, 104 Cal. App. 2d 463, 232 P. 2d 55;
44 *Am. Jur.* 345.

Appellants have no quarrel with this rule and if, in fact, the Capwell Lease of the station grounds property was cancellable on short notice there would have

been no litigation. Upon learning that the lease on parcel 2 in the complaint was cancellable on short notice, appellants waived any present claim to said parcel. Appellants have not made any present claim to the portion of the Capwell parking lot which is within the original railroad right-of-way since the lease for that portion of the parking lot was cancellable on short notice. (Ex. AB.)

The only evidence before the trial Court to aid in the interpretation of the original Capwell Lease (Ex. AA) was the lease itself. Appellee introduced into evidence General Order No. 69 of the Public Utilities Commission of the State of California[1], and successfully contended that this General Order made the lease cancellable on short notice.

---

[1]"General Order No. 69.

It is hereby ordered, that all public utilities covered by the provisions of Section 51 of the Public Utilities Act of this State be, and they are hereby authorized to grant easements, licenses or permits for use or occupancy on, over or under any portion of the operative property of said utilities for rights of way, private roads, agricultural purposes, or other limited uses of their several properties without further special authorization by this Commission whenever it shall appear that the exercise of such easement, license or permit will not interfere with the operations, practices and service of such public utilities to and for their several patrons or consumers;

Provided, however, that each such grant shall be made conditional upon the right of the grantor, either upon order of this Commission or upon its own motion to commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable so to do;

And provided, further, that nothing herein applies, or shall be deemed to apply to crossings of railroads or street railroads by private or public roads, passageways or footpaths, at grade or otherwise."

Since the interpretation of the lease is a legal matter this Court is not bound by the interpretation placed upon the lease by the trial Court.

Lundgren v. Freeman (9th Cir. 1962), 307 F. 2d 104.

Here any conclusion as to what the lease means must be based on application of a legal standard.

1.

The lease itself is clear and unambiguous as to its terms and as to the lack of any right of the railroad to terminate the same on short notice.

A careful reading of the lease in question (Ex. AA), the "Capwell Lease", clearly indicates the intention of the parties that it be a five-year lease with no right remaining in the railroad to terminate said lease except upon breach of the provisions thereof by the lessee. There is no provision in the lease for termination either by the railroad or by the Public Utilities Commission if it should be necessary to use the property in question for public utility purposes. As a matter of fact, when one examines the deletions and additions made to the printed lease it becomes even more obvious that it was intentionally made as a lease for a fixed term and not subject to termination or cancellation on short notice. This can be seen by comparing the Capwell Lease with the lease for the shingle yard. (Ex. AD.) The lease for the shingle yard was on a printed form substantially identical with the printed form used for the Capwell Lease, but for the Capwell Lease it was extensively and vitally modified.

In the heading of the Capwell Lease the word "limited", which modified the word "lease" on the printed form, was deleted.

In the first paragraph of the lease the words "for the term of five (5) years" were added to the lease and the following language was deleted:

> "continuing until terminated as provided in Section 8 hereof."

Said Section 8 of the lease, as printed, gave either party the right to terminate the lease by giving thirty days' written notice to that effect. This paragraph was specifically and intentionally altered to add the words: "upon the expiration of the term hereof either" party may terminate this lease by giving thirty days' written notice.

Appellee argued that paragraph 25 of the lease, which requires lessee to "observe and comply with all federal, state, county and municipal laws now in effect or hereafter enacted with respect to the occupancy of said leased premises," makes this lease terminable on short notice. However, it failed to point to any law which, without there being any specific provision in the lease, would make a five-year lease of property owned by the railroad terminable on short notice without a condemnation action being filed. Certainly, "compliance" by *lessee* would not require surrender by lessee of an estate in realty without compensation.

As has been previously pointed out, appellee was particularly careful in the supplemental agreement,

which added portions of its right-of-way to the original Capwell Lease, so as to make that portion of the parking lot located within the original right-of-way grant terminable on thirty days' written notice. (Ex. AB.) Every other lease offered into evidence, which purported to be substantially all of the leases entered into for parcels 1 and 2, contained a thirty-day termination clause.

It therefore appears that under no reasonable interpretation of the lease can it be terminated upon short notice by the appellee.

2.

The lease in question is a valid five-year lease despite any provision of Section 851 of the Public Utilities Code.

The essential question to be answered in this case is whether or not the Capwell Lease is a valid lease for five years certain. In the trial Court, appellee contended that a five-year lease would be void under Public Utilities Code Section 851. Appellants maintained that said section conclusively makes the lease valid.

Section 851, which prohibits the disposition of public utility property "necessary or useful in the performance of its duties to the public" without prior authorization by the Public Utilities Commission, is a prohibitive statute as to the utility and, rather than

being prohibitive, is *protective* as to a purchaser for value.[2]

Despite the unequivocal language in the lease establishing a five-year term, and the fact that the conveyance of the term was for a valuable consideration to one receiving it in good faith, appellant argued and the trial Court found that the lease is terminable on short notice because of Section 851 and because of General Order 69 of the Public Utilities Commission, which authorizes the granting of certain easements, licenses or permits.

It is common knowledge, not only subject to judicial notice but also adduced by evidence of the extensive holdings of appellee in Fremont and other cities, that

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[2]Section 851 of the Public Utilities Code as it read prior to amendment in 1959:

> "No public utility shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, nor by any means whatsoever, directly or indirectly, merge or consolidate its railroad, street railroad, line, plant, system, or other property, or franchises or permits or any part thereof, with any other public utility, without first having secured from the commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation made other than in accordance with the order of the commission authorizing it is void.
> . . .
>
> Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value."

railroads own and deal in real property, both operating and nonoperating in nature, and said properties are freely bought and sold by the carrier. It appears that the last paragraph of Section 851 of the Public Utilities Code, as applicable to sales, was enacted at the time the section was originally adopted in order to protect grantees of public utility property from just such a forfeiture as appellee proposes here. The Legislature created a conclusive presumption that property sold to a purchaser dealing with such property in good faith for value is presumed to be a property which is not "useful or necessary" in the performance by the public utility of its duties to the public.

By a 1951 amendment of Section 851 this conclusive presumption was extended not only as to good faith purchasers for value but also as to lessees and encumbrancers for value. The protection of the conclusive presumption was thus extended to the lessee in the Capwell Lease, here in question.

The statute and cases make it clear that it is *not* necessary to obtain the consent of the commission to transfer property which is not necessary or useful in the performance of public utility obligations.

Coast Valleys Gas & Electric Co., 13 C.R.C. 309 (1917);

East Bay W. Co., 13 C.R.C. 336 (1917);

Eagle Rock W. Co., 13 C.R.C. 212 (1917).

Public utilities are authorized to lease their nonoperating real property just as any private party is.

Atchison, Topeka and Santa Fe Railway Co., 48 P.U.C. 160.

The property here in question is *not operating property* but a long unused portion of the station grounds.

The last paragraph of Section 851 would be completely meaningless and surplusage if this Court were to hold that it does not apply if the property is, in fact, necessary and useful for public utility purposes.

If Section 851 applied to all necessary or useful public utility property conveyed in violation of its provisions there would be absolutely no necessity of adding the last paragraph to it. It is a fundamental principle of statutory construction that, whenever *possible*, effect should be given to a statute as a whole and to its every word and clause so that no part or provision will be useless or meaningless.

Weber v. Santa Barbara County, 15 Cal. 2d 82, 98 P.2d 492 (1940);

People v. Silver, 16 Cal. 2d 714, 108 P.2d 4 (1940);

California Code of Civil Procedure, Section 1858;

45 *Cal Jur.* 2d Statutes at 626.

It is presumed that every word, phrase and provision was intended to have some meaning and perform some useful office and a construction implying that words were used in vain or that they are surplusage will be avoided.

45 *Cal. Jur.* 2d Statutes at 627.

It is a further fundamental principle of statutory construction that "a statute must be construed so as to harmonize its various parts or sections, without

violence to the language, spirit, or purpose of the act. Wherever possible, seemingly conflicting or inconsistent provisions should be reconciled to avoid the declaration of an irreconcilable conflict and to carry out the fundamental legislative purpose as gathered from the whole act."

45 *Cal. Jur.* 2d Statutes at 627.

In keeping with these fundamental principles of statutory construction, it appears that certainly the legislature did not want public utilities to dispose of their *operating* property without prior consent of the commission. It further appears that the Legislature wanted to recognize the fact that public utilities own both operating and nonoperating property and it did not want to place the burden upon the public utility of seeking consent of the Public Utilities Commission every time that it wanted to dispose of nonoperating property. In order to accomplish this purpose the Legislature set up a rule that public utilities were not to dispose of operating property without the prior consent of the commission, but that if it did dispose of any operating property without the consent of the commission any *bona fide* purchaser for value acquiring such property could rest assured without applying to the Public Utilities Commission, that as to him the conveyance would be valid and binding. This the Legislature accomplished by creating the conclusive presumption that has been referred to so often in this brief.

It results that even if the public utility does dispose of operating property in violation of Section 851, *the*

conveyance itself is valid but the utility subjects itself to a great number of very severe penalties.

Obviously, if the utility involved was in doubt as to the status of the property it desired to transfer it would seek the consent of the Public Utilties Commission prior to making the transfer. If it was not in doubt, such as in this case, it would not seek a prior determination by the commission but would make the conveyance in question and under *any* circumstances that conveyance would be valid as to the one receiving the estate in the property so conveyed.

3.

General Order 69 of the Public Utilities Commission is not applicable to the Capwell Lease.

The trial Court found that the Capwell Lease came within the provisions of General Order 69 which authorizes public utilities to grant *easements, licenses* or *permits* for use of operative property provided the grant is made "conditional upon the right of grantor, either upon order of the commission or upon its own motion to commence or resume the use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable so to do."

a.

The Capwell Lease is not a property interest in the nature of an easement.

An easement is an interest in land in the possession of another. *Restatement of the Law of Property,* Sec-

tion 450, Subparagraph D. Under the lease in question the Capwell Company has exclusive possession of the parking lot to the exclusion of the defendant railway company. The fact that an easement and lease are inconsistent property interests is illustrated by the example set out on page 2904 of the *Restatement of the Law of Property,* as follows:

> "A, as the possessor of Blackacre, has an easement in Whiteacre, adjacent land in the possession of B. A leases Whiteacre from B for a period of ten years. As to his own ten-year possessory interest in Whiteacre, A's easement no longer exists. However, as against possessory interests subsequent to his own, he still has an easement."

b.

The Capwell Lease is not a license.

In California a license has been defined as a personal, revocable and non-assignable permission or authority to do an act or acts on the land of another, and is said not to be an interest in land.

Eastman v. Piper, 68 Cal. App. 554, 560, 229 Pac. 1002 (1924);

Von Goerlitz v. Turner, 65 Cal. App. 2d 425, 150 P.2d 278.

It is created to endure at the will of the possessor of the land subject to the privilege. *Restatement of the Law of Property*, Section 514 (b).

In distinguishing between a license and a lease the District Court of Appeal in the case of *Von Goerlitz v. Turner,* 65 Cal. App. 2d 425, 429, 150 P.2d 278 (1944), stated:

"The test . . . 'whether an agreement for the use of real estate is a license or a lease is whether the contract gives *exclusive possession of the premises against all the world, including the owner,* in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this is a question of law arising out of the construction of the instrument.' " (Emphasis added) See also *Kaiser Co. v. Reid,* 30 Cal. 2d 610, 184 Pac. 2d 879 (1947); *Hammond Lumber Co. v. County of Los Angeles,* 104 Cal. App. 235, 285 Pac. 896 (1930)

C.

The Capwell Lease is not a permit.

A permit has been defined as "a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority." *Black, Law Dictionary,* Fourth Edition.

In California the terms "license" and "permit" as they relate to real property, have been used synonymously.

See:

Kaiser Co. v. Reid, supra;

Hammond Lumber Co. v. County of Los Angeles, supra.

As is true with a license, the terms permit and lease are inconsistent and since it appears that the Capwell Company has possession of the parking lot by virtue of a lease, it then cannot have either a permit or license on the parcel of property in question.

Kaiser Co. v. Reid, supra.

d.

The grant of the Capwell Lease was not made conditional upon the right of the grantor either upon its own motion or upon order of the Public Utilities Commission to commence or resume the use of the property in question whenever it might appear in the interests of its service to its patrons or consumers that it would be necessary or desirable so to do.

Unlike every other lease in evidence, which provided for termination on short notice, the Capwell Lease was not made conditional upon anything. The fact that the lessee agreed to obey all laws does not mean that the lease can be terminated on short notice since General Order 69 *contemplates that the lease itself shall contain such a condition.* There is nothing in General Order 69 which makes the provision for termination on short notice to become a part of any lease in the absence of the grant itself containing such a provision. The statute under which General Order 69 was promulgated makes the lease conclusively valid. The Public Utilities Commission has no authority to the contrary.

If, in fact, General Order 69 is a part of every lease, then again the conclusive presumption that has been so often referred to in this brief, would become meaningless. If General Order 69 is to be reconciled with Section 851 and its conclusive presumption, then it must mean that whenever a public utility company permits others to use what the utility might consider to be operating property necessary or useful for its use, then the grant by which the use of the land is to be made must contain a provision authorizing the public utility, either upon order of the Commission or upon

its own motion, to terminate the use in question whenever it appears necessary or desirable in the interest of its service to its patrons or consumers to use said property.

B. By placing it beyond its power to use said parcel for five (5) years, the appellee has ceased to occupy the premises for railroad purposes.

1.

Nature of the grant.

It is difficult to determine from a reading of the conveyance in question, by which the railroad acquired its title, the exact nature of the interest conveyed. It appears, without question, that at least one of the following interests was conveyed by this deed:

1. An easement or right-of-way for railroad purposes.

2. A determinable fee simple with a possibility of reverter.

3. A fee simple title subject to a right of entry for condition broken.

Appellants take the position that the grant in question was an easement or right-of-way for railway use. However, for purposes of this litigation, it appears that it makes little or no difference as to which one of the three interests discussed above was conveyed by the deed in question. If the railroad acquired an easement, it is submitted that they surcharged it by the lease in question causing their easement to be extinguished. If plaintiffs' interest is a possibility of reverter or a right of entry for condition broken, then it is submitted that the same breach of condition by

defendant has caused fee simple title to revert to plaintiffs.

a.

The grant in question conveyed a right-of-way or easement for railroad uses.

While it is true that the grant is in a form used for conveying title in fee simple, nevertheless there is a qualification limiting the use of the property in question for railroad purposes. Furthermore, the deed recites a nominal consideration of $1.00. It is a general principle of construction that "in construing contracts and deeds for railroad rights of way such deeds are usually construed as giving a mere right of way, although the terms of the deed would be otherwise apt to convey a fee."

Highland Realty Co. v. City of San Rafael, 46 Cal. 2d 669, 298 P.2d 15 (1956);

See also:

City of Glendora v. Faus, 148 Cal. App. 2d 920, 307 P.2d 976 (1957).

The fact that no monetary consideration or only a nominal monetary consideration was paid for the grant is also a factor of considerable importance, indicating that the grant conveys an easement and not a limited fee.

Tamalpais etc. Co. v. N. W. Pac. R. R. Co., 73 Cal. App. 2d 917, 928, 167 P.2d 825 (1946).

b.

If the deed in question did not convey an easement or a right-of-way, then it conveyed title in fee simple subject to a right of entry for condition broken or a determinable fee simple.

In the case of the fee simple subject to a right of entry for condition broken, a demand for re-entry is required before the estate reverts to the grantor or his successor in interest. In the case of a determinable fee simple, title automatically reverts upon breach of the condition. See article "Future Interests in California" by Professor Harold E. Verrall, 7 West's Civil Code Ann., p. 1. See also *McDougall v. Palo Alto School District,* 212 A.C.A. 420; *Alamo School Dist. v. Jones,* 182 Cal. App. 2d 180, 6 Cal. Rptr. 272.

In the event that the railroad acquired title in fee simple and not an easement, it is submitted that title has reverted to appellants either automatically upon entry by appellee into the Capwell Lease or upon notification by appellants that they had breached this condition and the subsequent demand for re-entry that was made by appellants by letter (Exs. 4A and 4B) and by the filing of this suit.

C. An analysis of the words in question clearly indicates the condition has been breached.

1.

Cease.

It should be pointed out that there is no requirement that appellee abandon the premises in order for the condition contained in the Deed to come into effect. The fact that "cease" and "abandon" are not synonymous is indicated in the case of *Bradner v. Vasques,*

102 Cal. App. 2d 338, 341-42, 227 P.2d 559 (1951), where the Court defined "cease" as follows:

> ". . . The word 'cease' is defined to mean; 'To come to an end; to stop; to leave off or give over; to desist . . . To put a stop to . . . To cause to stop or desist from some action. To bring to an end; to discontinue or leave off.' (Webster's International Dict. 2d ed.) Webster says that *'cease' applies 'to that which is thought of as being.' The antonym of cease is 'continue.'* (Webster's Dict. of Synonyms, 1st ed.)" (emphasis added)

In view of the fact that the lessee has exclusive possession of the parking lot and that it does not contribute to the railroad, either by making or receiving shipments at or adjacent to the property involved, it certainly appears that there is not a railroad use in being on the premises at the present time or since, at least, 1952. If there is not a railroad use in being and if the property in question had been used for railroad purposes, then certainly it ceased being used for railroad purposes at the time of the Capwell Lease.

2.

Railroad purposes.

A non-terminable five-year lease of property to a regional department store for purposes of a public parking lot, where neither the property leased nor the adjacent property of the department store is used for sending or receiving shipments by rail, does not constitute a use of property for railroad purposes.

It is true that many uses which would on their face not appear to be railroad uses have been upheld where

the uses facilitate the transaction by a railroad of its ordinary business, 74 C. J. S. p. 500, or which are used for convenience in delivering or receiving freight. 74 C. J. S. 508. Other authorities have permitted the leasing of restricted railroad property for businesses which contribute to the railroad's business. See *City of Long Beach v. Pacific Elec. Ry.,* 44 Cal. 2d 599, 603, 283 P.2d 1036 (1955).

As has been previously stated, cases have upheld the use of restricted railroad property where the leases were subject to cancellation on short notice by the railroad.

The Capwell parcel does not fit into any of these categories. It certainly does not facilitate the business of the railroad, it does not contribute to the railroad's business, and it is not subject to termination on short notice. This Court can take judicial notice of the fact that the operation of a parking lot to serve a large regional department store is a big business and, incidentally, is a business which rather than contributing to railroad business, probably over the last twenty years has eliminated a great deal of the passenger business formerly handled by the railroads. The Courts of this land have been quick to grant relief to owners of property where railroads have violated conditions set forth in the grant, despite the numerous technical arguments that the railroads may have made.

Rosecrans v. Pacific Elec. Ry. Co., 21 Cal 2d 602, 134 P.2d 245 (1943);

Faus v. Pacific Elec. Ry. Co., 146 Cal. App. 2d 370, 303 P.2d 814 (1956);

City of Glendora v. Faus, 148 Cal. App. 2d 920, 307 P.2d 976 (1957);

Bond v. Texas and P. Ry. Co., (Louisiana) 160 So. 406 (1935);

Sparrow v. Dixie Leaf Tobacco Co., (North Carolina) 61 S.E. 2d 700 (1950);

Connolly v. Des Moines & Central Iowa Co., (Iowa) 68 N.W. 2d 320 (1955);

Virginia N. Railway Co. v. Avis (Virginia) 98 S.E. 638.

In the case of *Sparrow v. Dixie Leaf Tobacco Co., supra,* plaintiff brought an action in ejectment against a railroad which had a right-of-way over his land and against a tobacco company which was using a portion of the right-of-way. In 1935 the tobacco company acquired title to a tract of land adjacent to the railroad right-of-way and erected tobacco storage warehouses on this parcel. In 1936 the railroad leased a part of its right-of-way adjoining said property to the tobacco company, and there were constructed two storage warehouse buildings which were extensions of the building originally erected by the tobacco company on their own property. A sidetrack was installed by the railroad to serve these buildings. No protest was made to the construction or occupancy of these buildings prior to January, 1949. The trial Court held that this use was for railroad purposes. In reversing the judgment of the trial Court, the Supreme Court stated:

> "It may devote the right-of-way to any use which is indispensable to, or which will facilitate the fulfillment of, the objects of its corporate existence

> as a common carrier, or which is reasonably in aid of those purposes. 44 A. J. 338. Ownership of the easement carries with it the right to use the property within the bounds of the right-of-way for any purpose, the primary object of which is the furtherance of the business of the railroad. So long as the use to which the easement is subjected comes within this rule, the owner of the servient estate has no cause to complain, for the grant of the easement was for such purpose and constitutes a part of the dominant estate. The use, however, must be reasonably necessary for or convenient to the operation of the railroad. (Citations omitted)
>
> "On the other hand the railroad company possesses no right of authority to use or to let the property for private or non-railroad purposes . . . It cannot erect or permit the erection of warehouses, factories and the like, not necessarily connected with the use of their franchise, within the limits of their right-of-way. When property is taken for railroad purposes, the fee remains with the owner and, outside of the authorized use, the proprietary right is in the original owner. (Citations omitted) . . ."

In *Bond v. Texas and P. Ry. Co.* (Louisiana) *supra,* the Court enjoined a railroad from leasing a portion of its right-of-way to a cotton gin company for purposes of operating a gin for private purposes.

In *Connolly v. Des Moines and Central Iowa Railway Co.* (Iowa) *supra,* plaintiff sought to enjoin the

defendant's condemnation of a railroad right-of-way, contending that the property had reverted to them for the reason that the deed provided for operation of a railway by electricity and because diesel locomotives had been substituted for electricity. The deed further required the operation of a passenger line and such freight as might be incidental to said business and passenger service had been discontinued. The Court, in upholding the reversionary clause, stated at page 324 of its opinion:

> "Defendant first contends there was no violation of the terms of the Nourse conveyance as to cause the right-of-way to revert. The argument is based on the evidence that the area is served now by passenger buses operating on streets and the deed should be interpreted in the light of modern methods of passenger transportation. There is no merit in the argument. This strip of right-of-way was never condemned. The parties in effect contracted that the right-of-way would revert in the event the electric railroad passenger service would be discontinued. They had a right to contract as they wished. If the original grantee did not like the terms pressed upon it by the owner, it could have condemned. It avoided condemnation by accepting something less than full rights and, theoretically, at least, by paying something less than full compensation."

It is thus apparent from these cases that the Courts will lend meaning to the intention of the parties as expressed by their language in the conveyances in question.

3.

Occupy.

In the case of *People v. Simon*, 66 Cal. App. 2d 860, 153 P.2d 420 (1944), the Court referred to Funk & Wagnall's Standard Dictionary to define occupy, as follows:

> "To use or employ in an exclusive manner; to take and hold possession of; inhabit."

This short definition clearly indicates that one cannot occupy that which it does not have the right to possess.

4.

Cease to occupy.

The phrase "cease to occupy" has been defined by the Supreme Court of Minnesota in the case of *Quehl v. Peterson,* 49 N.W. 390, as used in the Homestead Exemption Laws of that state, as meaning a "cessation of actual occupancy and residence, though accompanied with an intention to return and resume such occupancy." This interpretation appears to be a common sense and logical one. If the parties had intended to use the word "abandon" rather than "cease to occupy" they would have used that word. Defendant does not possess the premises in question and therefore does not occupy it presently for any purpose.

5.

Said premises.

Appellee argued in the Trial Court that as long as it devotes any portion of the 4.04 acre parcel to railroad purposes that it has complied with the condition in the

deed. Certainly this construction by the appellee would do violence to the intention of the parties, since, if appellee's contention is correct, then it could construct a small shed for storing a few items of railroad equipment on one corner of the parcel and could lease the balance on a 99-year lease for the highest type of commercial development.

The doctrine of partial reversion has been recognized by the Courts of this state as well as the Courts of other states:

Tamalpais Land and Water Co. v. N. W. Pac. RR. Co., 73 Cal. App. 2d 917, 167 P.2d 825 (1946);

Atlantic Coast Line R. Co. v. Sweat, 171 S.E. 123 (Georgia);

Virginian Railway Co. v. Avis, 98 S.E. 638 (Virginia).

In the *Tamalpais* case the California District Court of Appeal, in reversing a judgment directing a verdict in favor of defendant railroad and ordering a retrial, pointed out at page 929 of its opinion:

> "If the 1893 deed conveyed a fee subject to a condition subsequent, in a proper case there can be a partial violation and a partial reversion. On the other hand, if it conveyed a mere easement, the law is well settled that there can be a partial extinguishment of such easement. (See Restatement of Property (Servitudes), chapter 41, p. 3060, Introductory Note.) There are many cases where the courts have held, in reference to deeds conveying property rights to a railroad, that a

> partial abandonment extinguishes so much of the right as has been abandoned. (Citations omitted) One of the most interesting and best reasoned cases on this subject is *Atlantic Coast Line R. Co. v. Sweat*, 177 Ga. 698 [171 S.E. 123]. In that case certain lands were conveyed to the railroad for the construction of a railroad thereon, the grantee to retain the lands for so long as it or its 'successors and assigns, shall maintain and use said road; but to revert to the said party of the first part whenever said road shall be abandoned.' In the amended complaint it was alleged that the railroad had constructed the road and thereafter abandoned a portion. The court held that the plaintiff could recover the portion abandoned even though the balance was being used for railroad purposes. The court stated (p. 130 [171 S.E.]): 'While upon a technical construction of the contract it might be considered as entire and not divisible, so that the railroad company would not lose its claims to any part of the right-of-way so long as it maintained and used substantially all of it, yet, when there was a definite and positive nonuser by the railroad company of a particular segment of the right-of-way formerly occupied by it, the company itself is responsible for the severance, and will not be heard to say that the contract is indivisible. An entire contract may be apportioned in some cases.'"

In *Virginian Railway Co. v. Avis, supra,* plaintiff conveyed property to the railroad with the granting clause containing the following sentence:

> "The above granted land is to be used for depot purposes and facilities connected therewith."

Two small parcels were conveyed under this deed. On the larger of the two parcels the railroad erected and maintained a passenger freight depot. The smaller parcel was leased under a contract which could be cancelled at any time and there was erected on this parcel, by the lessee, a warehouse, a storehouse, a shed, and a cotton gin. The position of the railroad, as expressed by the Court at page 638 of this opinion was as follows:

> "That as much of the land as may be necessary therefor shall be used for depot purposes and facilities connected therewith, and that unless and until all of the land shall be required for that purpose, the company has the right to use the residue for any legitimate purpose, so that such purpose be not inconsistent with the future use of the property for depot and railroad purposes when and as necessary."

The Supreme Court of Appeals of Virginia, in anwsering this contention, stated at page 639 of its opinion:

> "The purpose of all written contracts and conveyances is to say what the parties mean, and the only legitimate or permissible object of interpreting them is to determine the meaning of what the parties have said therein. In doing this, the language used is to be taken in its ordinary signification, unless it has acquired a peculiar meaning with reference to the subject matter, or unless the context plainly shows that such language is used in some other peculiar sense. . . .
>
> "A conveyance of land to a railway company 'to be used for depot purposes and facilities con-

> nected therewith,' if taken upon its face and given its primary and most apt and natural meaning, immediately conveys the thought that the company will be expected to use at least a part of the land for a depot, and the residue for facilities connected therewith; and to say that it means that the company will use only such part as it needs for a depot and incidental facilities, and may lease the residue to outsiders for business purposes wholly apart from its passenger and freight operations, is to say something which the parties did not say, and to ascribe a meaning to their words which comes as a second thought and finds its support not in the words used, but in a refinement or construction based upon secondary and inapplicable rules of interpretation. The secondary rules will be presently mentioned; but we say that they are inapplicable because, if it be conceded that the covenant is not clear on its face, we must next look to the circumstances surrounding its execution, and they certainly remove all doubt as to its meaning."

It is therefore submitted that because of the breach of the condition as outlined herein, fee simple title was vested in plaintiffs free and clear of any rights of the defendant to parcel 1 described in the complaint.

D. A very recent decision of the California District Court of Appeal supports appellant's position.

The California District Court of Appeal, First District, Division One, recently had before it the case of *McDougall v. Palo Alto School District,* 212 A.C.A. 420. This case was decided on January 29, 1963. The

deed in question involved a school house and it provided for the property to revert if the school district "shall abandon the premises hereby conveyed for school purposes or shall fail, neglect or refuse to use said premises for common school uses." The Trial Court found that though the school building was not being used, that there was no automatic defeasance of the district's title. The Trial Court based its findings upon the fact that plans had been discussed for a new school at the site and therefore concluded that no abandonment was intended. In reversing the Trial Court, the District Court of Appeal stated that abandonment was not a necessary condition for "any failure, neglect or refusal to use the property for common school uses and purposes." would terminate the school's interest in the property. The Court went on to state at page 437 of its opinion:

> "Thus, even if we should accept the court's conclusion that the district never *abandoned* the land, it is beyond dispute that for almost twenty (20) years it failed to *use* it for school purposes."

"Failed to use" and "cease to occupy" would be almost synonymous in meaning and therefore it would appear that the *McDougall* case is very parallel to the instant case.

It is therefore submitted that appellee has breached the condition in the Deed and that fee title to the premises is now in appellants.

II

APPELLANTS ARE THE OWNERS OF THE PARCEL IN QUESTION AND ARE ENTITLED TO MAINTAIN THIS ACTION.

A. The findings of fact show that appellants are the owners of said parcel.

The Trial Court found that appellants are the heirs of the original grantors of the parcel in question, A. S. Botello and Maria Silva Botello, his wife. (R. 72.) It further found that "said grantors and their heirs disposed of all of their lands which *adjoined* a portion of the property conveyed to said Southern Pacific Railroad Company." (R. 77.) It also found that appellants, at the time of the commencement of the action "were not and none of them was then the owner of the lands adjoining said Parcel 1, or any part thereof." (R. 77.) The Trial Court carefully avoided making any finding of fact that appellants or their predecessors in interest had disposed of any interest that they may have had in Parcel 1. With these Findings of Fact the Trial Court concluded that because all of appellants' adjacent property had been disposed of that they "do not have an enforceable right, claim or interest in the further compliance on the part of defendant or those claiming under defendant with the conditions contained in said deed." (R. 79.)

If this conclusion is correct then it is submitted that there is no one in existence who can enforce the conditions contained in the 1890 deed and therefore the railroad would be in a position to do whatever it wanted with the property in question despite the

contract it made with A. S. Botello and Maria Silva Botello.

B. Appellants and their predecessors in interest have conveyed away the adjacent property by metes and bounds description, none of which described the station grounds or the right-of-way and thus appellants still retain an interest in these two parcels of property.

The evidence is clear and uncontradicted that all the conveyances of the property adjacent to the station grounds and the railroad right-of-way was by metes and bounds description. This was testified to by the Southern Pacific Company engineer. (R.T. page 29, lines 6 through 20.) The maps prepared by the appellee's engineers also show that the descriptions did not include the property in question. (Ex. M through T.)

In the Trial Court appellees argued that a conveyance of land bounded by a railroad right-of-way passes title to the center of the right-of-way. Their argument was based upon the provisions of Sections 831 and 1112 of the Civil Code of the State of California. Section 1112 provides in substance that a transfer of land bounded by a *highway* passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof *unless a different intent appears from the grant.* The appellees successfully argued to the Trial Court that railroad rights-of-way, in essence, are highways and therefore, despite the fact that the statute does not refer to railroad rights-of-way it still should be applied.

It should be pointed out that on the west side of the railroad tracks we are talking about both a railroad right-of-way, to wit: the 100 foot strip of land upon which the railroad tracks are located, and the "station grounds," the 100 foot wide strip of land upon which the railroad station is located. As the Court can see from viewing a plat of the station grounds (see Exs. 2 and W) these grounds do not run the length of the right-of-way but for a relatively short distance large enough in size to take care of the permanent facilities installed at the Walnut Creek Station. The station grounds also are apparently large enough to lease out portions thereof for private facilities such as the parking lot in question.

Assuming for the sake of argument that these two sections of the Civil Code apply to railroad rights-of-way, there certainly would be no reason why they should apply to the station grounds since the station grounds are no different from any other piece of private property. There is no question that a deed that would refer to a conveyance of private property would not include to the center of the private property unless the intention of the parties clearly appeared to the contrary. Thus the Trial Court's finding that a conveyance to the boundary line of the station grounds deprived appellants of all of the rights in and to said station grounds would appear to be without support either in evidence or in law.

The California Courts have held that the provisions of Sections 831 and 1112 of the Civil Code are simply rules of construction and excluded from these rules

of construction is the situation where the description of a property used is a sideline of the street, rather than the street itself as a boundary.

Speer v. Blasker, 195 Cal. App. 2d 155, 159, 15 Cal. Reptr. 528 (1961);

Warden v. South Pasadena Realty, etc. Co., 178 Cal. 440, 442, 174 Pac. 26 (1918);

Severy v. Central Pacific R. R. Co., 51 Cal. 194, 197, (1875).

In *Speer v. Blasker, supra,* plaintiff sought to quiet title to a strip of property 40 feet wide and 203.56 feet long, which was formerly a part of a street. The defendants claimed a portion of the street on the theory that the deed to them conveyed title to the center of the street in question as a matter of law. The defendants had acquired title to their property by a metes and bounds description, which used the sideline of the street, rather than the street itself as a boundary. In holding that the defendants had no interest in any portion of the street, the Court stated at page 159 of its Opinion that the rule set forth in Section 1112 of the Civil Code did not apply because:

> "Excluded from the rule, because the reason therefor does not apply, is a deed wherein the description of the property conveyed uses a sideline of the street, rather than the street itself, as a boundary."

In *Severy v. Central Pacific R. R. Co., supra,* the description was as follows:

> "Thence *along the easterly line* of Sacramento Street 150'."

The Supreme Court of our State in holding that the deed meant what it said, stated:

> "It is very clear, therefore, that the parties to the instrument intended that the lots should run up to the eastern line and not to the middle of the street."

It is a further rule of law in our State that where a metes and bounds description is used, the rule set forth in Section 1112 of the Civil Code does not apply.

City of Redlands v. Nickerson, 188 Cal. App. 2d 118, 10 Cal. Rptr. 431 (1961).

See also

Jones v. Braumbach, 193 Cal. 567, 226 Pac. 400 (1924);

Berton v. All Persons, 176 Cal. 610, 614, 170 Pac. 151.

Here it is uncontradicted that a metes and bounds description was in fact used. If the Court is to re-write the deeds to the adjacent property, then the Court will create an ambiguity in the deeds which did not exist when they were written in that the boundaries will not close. As testified to by the Southern Pacific Company engineer the boundaries do not include any portion of the railroad property. If the Court were to include the railroad property obviously the distances shown on the deed would be in error. Since the deeds are clear and unambiguous it is submitted that they should not be re-written by the Court to include property not intended to be included by the parties. It is submitted that the Trial Court in this

case has fallen into the same error committed by the Trial Court in the case of *Goodman v. Southern Pacific Co.,* 143 C.A. 2d 424, 299 P. 2d 321. In the *Goodman* case the plaintiffs under the provisions of a deed similar to the one in this case sought declaratory relief as to portions of land which they alleged were not being used for railroad purposes. The Trial Court and the Appellate Court found that because of the long delay involved, they would not at that time enforce any rights the plaintiffs may have had to the property in question. The Trial Court's judgment indicated that because of plaintiff's laches the property might be put to any use in the future, which the railroad desired. In modifying the judgment of the Trial Court, the District Court of Appeal stated, at page 429 of its Opinion:

> "The judgment as it stands perhaps might be subject to the interpretation that the property may be put to any use in the future which does not interfere with railroad purposes. We think that the judgment should be limited, and it is not unlikely that the court intended so to do, to denying forfeiture or reentry because of past and present uses and because of nonuse of part of the land and to retaining in general the reversionary right of plaintiffs. Although the action was denominated one for declaratory relief, essentially it was one to declare a forfeiture, and the answer simply prayed that plaintiffs take nothing. Accordingly, the judgment is modified to deny that forfeiture or reentry be decreed because of past or present use of parts of the land or for nonuse of other parts, and to preserve the reversionary right as contained in the deed."

Under the Findings of Fact and Conclusions of Law, as well as the Judgment in this case, it appears that the Southern Pacific Company is free to do with the property in question anything that it desires despite the contract that it entered into in 1890 with the owners of the property. We are sure that this was not the Trial Court's intention in this matter, however it is the only conclusion that one can come to in reviewing the Findings of Fact and Conclusions of Law.

It is submitted that even if this Court should decide that appellee has not violated the terms and provisions of the 1890 deed, that like in the *Goodman* case appellants herein should not be deprived of any right, title or interest they may have in and to the property in question.

III

CONCLUSION

There were many points raised in the Trial Court relating to the jurisdiction of the Court and numerous affirmative defenses raised by appellees, none of which were decided by the Trial Court. Therefore no reference is being made to these points in this brief.

It is therefore submitted that the judgment of the Trial Court should be reversed and that title to the property in question should be quieted in appellants.

Dated, Fremont, California,
June 21, 1963.

LeRoy A. Broun,
Bernard M. King,
By Bernard M. King,
Attorneys for Appellants.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Bernard M. King,
Attorney for Appellants.

(Appendix Follows)

Appendix.

Appendix

LIST OF EXHIBITS
(Pursuant to Rule 18, 2(f))

Plaintiff's Exhibits	Identified	Offered	Received
1	33	33	33
2	37	37	37
3-A	37	37	37
3-B	37	37	37
3-C	37	37	37
3-D	37	37	37
3-E	56	56	56
4-A	56	56	56
4-B	56	56	56
5	82	87	87

Defendant's Exhibits	Identified	Offered	Received
A	15	23	23
B	15	23	23
C	15	23	23
D	18	23	23
E	18	23	23
F	15	23	23
G	18	23	23
H	18	23	23
I	18	23	23
K	23	23	23
L	23	23	23
M	18	23	23
N	18	23	23
O	18	23	23
P	18	23	23
R	18	23	23
S	18	23	23
T	18	23	23

Defendant's Exhibits	Identified	Offered	Received
U	18	23	23
V	18	23	23
W	18	23	23
X	57	57	57
Y	63	63	63
AA	19	23	23
AB	20	23	23
AC	20	23	23
AD	23	23	23
AE	23	23	23
AF	23	23	23
AG	23	23	23
AH	23	23	23
AI	23	23	23
AJ	23	23	23
AK	23	23	23
AL	23	23	23
AM	23	23	23
AN	23	23	23
AO	66		
AP-1	71		
AP-2	71		
AP-3	71		
AP-4	71		
AQ	100	102	102
AR	101	102	102

No. 18,535

In the

United States Court of Appeals

For the Ninth Circuit

ANTOINETTE BORNHOLDT, et al.,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, et al.,
Appellees.

Brief for Appellee Southern Pacific Company

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SUPPLEMENTAL STATEMENT OF THE CASE

The Statement of the Case on pages 2 to 7, inclusive, in appellants' opening brief is supplemented and clarified as follows:

The deed dated August 6, 1890 (Ex. C), under which appellee acquired title to the depot grounds at Walnut Creek in Contra Costa County, California, was delivered to Southern Pacific Railroad Company (appellee's predecessor in interest) pursuant to the terms of a written instrument dated August 31, 1890 (Ex. B). The owners of certain land in Contra Costa County (including the grantors in the August 6, 1890 deed) deposited executed deeds, conveying necessary rights of way and depot grounds in

and through lands owned by them, with the Bank of Martinez at Martinez, California, for delivery to Southern Pacific Railroad Company, upon condition that construction of the San Ramon Branch Railroad be completed on or before July 1, 1891 (Ex. B). The construction of the San Ramon Branch Railroad was completed in June 1891 and the depot was constructed at Walnut Creek shortly thereafter. The railroad line and depot at Walnut Creek have been maintained and operated continuously up to the date of the First Amended Complaint herein (Ex. Z).

By lease dated September 23, 1952 (herein referred to as the Capwell lease), appellee leased to Capwell store's assignor the major portion of Parcel One described in the First Amended Complaint herein (Ex. A-A). The area of the property described in the Capwell lease is less than the area of Parcel One (Ex. W).

There is no public street reaching Parcel One (R.T. 45-47). The proximity of Parcel One to existing railroad tracks makes feasible the installation of a spur track thereon to provide rail service for Capwell store purposes (R.T. 107-08).

The evidence shows the depot constructed on the land conveyed by the August 6, 1890 deed has been maintained and used to handle a substantial volume of railroad business (Exs. A-Q and A-R), and that the depot grounds (which includes the property described in the First Amended Complaint herein) are required for future railroad operating needs in connection with the proposed upgrading of the San Ramon Branch to a by-pass main line and the installation of facilities for purposes of the expanding container and piggyback rail-truck service (R.T. 68-73; see Ex. 5). Appellee has entered into numerous leases covering portions of the depot grounds at Walnut Creek for railroad and other purposes (Exs. A-D through A-N) dur-

ing the period from 1891 to the date of the complaint filed in this matter without claim made by grantors, or those claiming under the grantors, of any breach on the part of appellee of the provisions contained in the August 6, 1890 deed.

REPLY TO APPELLANTS' SPECIFICATION OF ERRORS

The trial court did not err in its finding V, referred to in item 1 on page 7 of appellants' opening brief, that the reversionary clause in the August 6, 1890 deed was intended by the grantors for the benefit of their lands adjoining the property described therein and their ownership interest therein. The deed was delivered to the railroad company pursuant to the instrument dated August 31, 1890 (Ex. B) in which the grantors agreed to convey to Southern Pacific Railroad Company the necessary right of way and depot grounds for the San Ramon Branch Railroad in and through land in Contra Costa County, California, owned by them, upon completion of the construction, on or before July 1, 1891, of a continuous railroad track from Martinez to San Ramon. The construction of the railroad line through Walnut Creek was completed and the operation of such railroad line was commenced on or about June 7, 1891 (Ex. Z). In such circumstances, it may be reasonably inferred the August 6, 1890 deed was delivered to Southern Pacific Railroad Company in consideration of the benefit to the grantors' adjoining property and their interest therein by reason of the construction and operation of the San Ramon Branch Railroad. Inferences are evidence.[1] If different reasonable

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1. Indirect evidence is of two kinds:
   1 Inferences and
   2 Presumptions
   Cal. Cod. Civ. Proc. § 1957; *Scott v. Burke,* 39 Cal. 2d 388 247 P.2d 313 (1952).

inferences can be fairly drawn from the evidence, the reviewing court cannot disturb District Court's findings based on such inferences unless they are clearly erroneous. *James v. United States,* 252 F.2d 687 (1958). The inferences drawn by the trial court, unless clearly erroneous, are controlling on review. *Rich v. Pappas,* 229 F.2d 308 (1956). It is respectfully submitted such evidence is sufficient to support the above finding of the trial court.

The trial court did not err in the findings VI and XII, referred to in items 2 and 4 on pages 7 and 8 of appellants' opening brief, that Parcel One described in the First Amended Complaint herein has been used and held available by appellee and its predecessors in interest for such railroad purposes as may have been needed and required at all times concerned herein, that they never ceased to occupy the same for railroad purposes, and that the use of Parcel One for a parking lot did not violate nor constitute a breach of provision of the August 6, 1890 deed. The railroad line through Walnut Creek was constructed in 1891 and the Walnut Creek depot was constructed shortly thereafter. They have been maintained and operated continuously up to the date of the First Amended Complaint herein. The land described in the August 6, 1890 deed has been used or kept available to the extent required for railroad purposes by appellee and its predecessors in interest (Ex. Z). The summary of the shipments handled at Walnut Creek depot from 1955 through 1961 (Exs. A-Q and A-R) discloses a substantial volume of railroad business is transacted at such depot, including less-than-carload shipments received for subsequent delivery by appellee's truck service to the Capwell store at Walnut Creek. Capwell's have considered installation of a railroad spur track

upon a portion of Parcel One for receipt of carload shipments of merchandise (R.T. 107-08). Appellee has leased portions of the depot grounds at all times since the acquisition thereof for railroad and other purposes, subject to keeping such property available for the requirements of its service to the public (Exs. A-A through A-N), without claim made prior to the complaint herein by the grantors in the August 6, 1890 deed, or by those claiming under such grantors, of any breach of the deed provisions. Future railroad use for which the depot grounds at Walnut Creek are held by appellee includes installation of rail facilities in connection with the upgrading of the San Ramon Branch to a by-pass main line and the installation of satellite terminal facilities for appellee's expanding piggyback and container operations (R.T. 64-94, see Ex. 5). It is submitted such evidence is sufficient to support the above findings of the trial court.

The trial court did not err in finding IX that the Capwell lease was made expressly subject to termination at any time by appellee or the Public Utilities Commission of the State of California in the event use of the leased premises should become necessary or desirable in order for appellee or its predecessor to serve the public or its patrons.

Section 25 of the Capwell lease (Ex. A-A) reads as follows:

> "Lessee shall and hereby agrees to observe and comply with all federal, state, county and municipal laws now in effect or hereafter enacted with respect to the occupancy of said leased premises, in default of which Railroad may at its option forthwith terminate this lease and reenter upon the said leased premises and remove all persons therefrom."

Even in the absence of such express lease provision, the lease is subject to California law.[2] The laws of a state become a part of a contract and are as obligatory upon all courts as if they were referred to or incorporated in the terms of the contract. *Brown v. Ferndon*, 5 Cal. 2d 226, 231, 54 P.2d 712, 714 (1936).

Section 851 of the Public Utilities Code of the State of California, prior to its amendment in 1959, provided that no public utility shall lease its property necessary or useful in the performance of its duty to the public without first having secured from the Commission an order authorizing it to do so. Every lease made other than in accordance with the order of the Commission authorizing it is void. Section 851 further provides that nothing in the section shall prevent the lease by any public utility of property which is not necessary or useful in the performance of its duties to the public and the disposition of property by a public utility shall be conclusive and be presumed to be of property which is not useful or necessary in the performance of its duty to the public as to any lessee dealing with such property in good faith for value.

Appellants cite on page 15 of their opening brief several decisions of the California Railroad Commission (now the Public Utilities Commission) in which it was determined the particular property involved was not necessary in the performance of the duties of the public utility to the public. In other cases, the Public Utilities Commission has assumed jurisdiction over property of a public utility determined to be necessary or useful in the performance of its

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2. *Traders & General Insurance Co. v. Pacific Employers Insurance Co.*, 130 Cal. App. 2d 158, 278 P.2d 493 (1955); *Ballerina v. Schlage Lock Co.*, 100 Cal. App. 2d 859, 226 P.2d 771 (1950); *American National Bank & Trust Co. v. U.S. Fidelity & Guaranty Co.*, 7 F. Supp. 578, 582 (1934).

duties to the public. In authorizing a transfer of utility properties to an entity not subject to regulation under the Public Utilities Act, the Commission has jurisdiction to impose such conditions, as, in its judgment, will protect and safeguard existing rights of those entitled to service. *East Side Canal & Irrigation Co. and Stevenson Water Dist.,* 41 C.R.C. 789 (1939). In the matter of *Princeton-Cadora-Glenn Irrigation District,* 13 C.R.C. 484 (1917), an application was made by the District to sell its property to purchasers unknown at an undetermined selling price. The Commission determined the property was operating property and granted the application, subject to subsequent Commission approval of the consideration and terms of each transaction by supplemental order. In all of the above cases, the Public Utilities Commission determined whether particular public utility property is operating or non-operating in character and, if determined to be operating property, it prescribed the conditions upon which a transfer or lease thereof could be made.

In order to avoid the necessity of obtaining the approval of the Public Utilities Commission for all uses made of portions of operating property of a public utility, the Commission issued General Order No. 69, granting blanket authority to public utilities to grant easements, licenses and permits; "provided, however, that each such grant shall be made conditional upon the right of grantor, either upon order of this Commissioner upon its own motion to commence or resume the use of the property in question whenever, in the interest of service to its patrons or consumers, it shall appear necessary or desirable to do so." The appellants contend the Capwell lease does not fall within the category of an easement, license or permit authorized under General Order No. 69. It is surprising

appellants take such position. If such contention is correct, the Capwell lease was issued without a Commission order approving it and it is therefore void, which disposes of the case at hand so far as appellants are concerned, inasmuch as on page 13 of their opening brief, appellants describe as an essential question to be answered in this matter whether or not the Capwell lease is valid for its original five-year term.

An examination of the Capwell lease discloses under section 1 thereof it is made for the sole purpose of automobile parking. Under section 14, the lessee is prohibited from constructing structures of any character on the premises without the written consent of appellee. It thus appears the permission granted under the Capwell lease to use the premises for automobile parking is in the nature of a license or a permit within the contemplation of the authority granted by the Public Utilities Commission under its General Order No. 69. A license or permit granted by a written instrument may remain in effect for such term as may be agreed upon by the parties and as specified in the written instrument. A license coupled with an interest is not revocable at will but continues to exist for the period contemplated by the license (31 Cal. Jur. 2d 221).

Appellants allege, on page 16 of their opening brief, the property in question is not operating property. The evidence in this case, however, clearly shows such property is an integral part of the depot grounds at Walnut Creek and is properly classified as operating property. A substantial volume of business is handled at the Walnut Creek depot (Exs. A-Q and A-R). Portions of the depot grounds have been leased for railroad and other purposes at all times, subject to keeping the property available for railroad operating requirements (Exs. A-A through A-N). The

testimony of appellee's witness John N. Cetinich (R.T. 64 through 94) shows the depot grounds at Walnut Creek, including the portion thereof leased to Capwell, are properly classified and held by appellee as operating property. He testified at length concerning the need for such property in connection with the proposed upgrading of the San Ramon Branch to a by-pass main line and the installation of additional terminals for appellee's expanding piggyback and container operations (R.T. 67-90).

Where, as in this case, property is acquired for railroad purposes and such public use has intervened by reason of construction of railroad facilities, the court cannot divest the public utility of title to the property required for such public purposes without the prior consent of the Public Utilities Commission. *Hosford v. Henry,* 107 Cal. App. 2d 765, 238 P.2d 91 (1951). The purpose of section 851 of the Public Utilities Code is to prevent (once acquired) the disposition of such property without prior consent of the Public Utilities Commission. If the courts can take action (without the prior consent of the Public Utilities Commission) which has the effect of taking away the property or any part thereof, then a party would be able to bring about indirectly through court action what cannot be done directly without the prior consent of the Public Utilities Commission. Such disposition of public utility property is prohibited by section 851 of the Public Utilities Code. *Hosford v. Henry, supra.*

In *Slater v. Shell Oil Co.,* 39 Cal. App. 2d 535, 547, 103 P.2d 1043, 1050 (1940), the court, in referring to section 851 of the Public Utilities Code, states in part:

> "The section means what it plainly states, that a purported transfer in violation of the statute confers no rights on the transferee."

It is submitted the above evidence clearly shows the property described in the Capwell lease is necessary for the performance of railroad service, subject to the jurisdiction of the Public Utilities Commission under section 851 of the Public Utilities Code, and the permission granted for parking purposes on Parcel One was subject to termination as provided in General Order No. 69 in accordance with the finding of the trial court referred to in this subsection.

The trial court did not err with respect to the conclusions of law referred to as items 5 to 8, inclusive, on page 8 of appellants' opening brief. The reasons why the court did not err are hereinafter set forth in appellee's argument in this brief.

ARGUMENT

For convenience of the court, the arguments in this reply brief will be addressed to the arguments made by the appellants in the same order as they appear in their opening brief, following which additional arguments of appellee will be set forth.

I. Appellee Has Not Ceased to Occupy the Premises in Question for Railroad Purposes.

A. THE CAPWELL LEASE WAS SUBJECT TO TERMINATION DURING THE INITIAL FIVE-YEAR TERM THEREOF BY APPELLEE OR BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA IN THE EVENT USE OF THE PROPERTY WAS REQUIRED FOR SERVICE TO THE PATRONS OF APPELLEE AND THEREAFTER UPON THIRTY DAYS' NOTICE BY APPELLEE FOR ANY REASON WHATSOEVER.

Appellants, at page 11 of the opening brief, cite the case of *Lundgren v. Freeman*, 307 F.2d 104 (1962), as standing for the proposition the interpretation of a lease is a legal matter in which the court is not bound by the interpretation placed upon the Capwell lease by the trial court. However,

the actual holding in the *Lundgren* case is that the provision in Rule 52(a) of the Federal Rules of Civil Procedure that "findings of fact shall not be set aside *unless clearly erroneous*" (emphasis added) is the rule to be followed, even though the trial was on written instruments. The court states Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court.

1. The Capwell Lease Is Subject to California Law.

Paragraph 25 of the lease expressly obligates the lessee "to observe and comply with all federal, state, county and municipal laws now in effect or hereinafter enacted with respect to the occupancy of said leased premises." The trial court correctly determined the lease was subject, during the initial term thereof, to the provisions of Section 851 of the Public Utilities Code of the State of California and General Order No. 69 of the Public Utilities Commission. Even in the absence of an express provision in the lease subjecting it to California law, such laws and administrative regulations thereunder are a part of every lease entered into covering property in the State of California. Where parties make their contracts in contemplation of a law of the state, such law of the state becomes a part of the contract and certainly would be so enforced by the state court. *American National Bank & Trust Co. v. U.S. Fidelity & Guaranty Co.*, 7 F. Supp. 578, 582, *supra*.

The effect of Section 851 and General Order No. 69 is to authorize Railroad to permit use of Parcel One, described in the First Amended Complaint herein, for automobile parking purposes, subject to the termination of such per-

mission by either appellee or the Public Utilities Commission in the event it is determined such property is required for service to the patrons of appellee. The argument in support of this proposition has been fully set forth in prior discussion of the trial court's findings and will not be repeated for such reason.

2. The Capwell Lease Is Subject to the Provisions of Section 851 of the Public Utilities Code and to General Order No. 69 of the Public Utilities Commission Issued Thereunder.

As previously pointed out, Section 851 provides that no public utility shall lease property necessary or useful in the performance of its duty to the public without first having secured from the Public Utilities Commission an order authorizing it to do so and every lease made other than in accordance with the order of the Commission is void. In this instance, the Capwell lease was authorized by General Order No. 69 of the Commission subject to termination if the premises were required for service to appellee's patrons. The evidence previously referred to in support of the trial court's findings shows Parcel One is operating property subject to jurisdiction of the Commission.

B. THE TRIAL COURT CORRECTLY DETERMINED APPELLEE DID NOT CEASE TO OCCUPY THE PREMISES IN QUESTION FOR RAILROAD PURPOSES.

The appellants allege, on page 22 of their opening brief, that the nature of the property interest conveyed by the deed under which Railroad acquired title to the depot grounds is one of the following interests:

1. An easement or right of way for railroad purposes;
2. A determinable fee simple with the possibility of reverter;
3. A fee simple title subject to a right of entry for a condition broken.

The appellants further state it makes little or no difference as to which one of the three interests was conveyed by the deed in question.

It is appellee's position fee simple title is vested in Southern Pacific Company to the property described in the August 6, 1890 deed for the reason the provisions in the August 6, 1890 deed are unenforceable. Real property devoted to railroad purposes may be held by any recognized estate in land. *Lemon v. Los Angeles Terminal Ry.,* 38 Cal. App. 2d 659, 102 P.2d 387 (1940). "A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." Section 1105 of the Civil Code of the State of California. "A grant is to be interpreted in favor of the grantee." Section 1069 of the Civil Code of the State of California.

A deed by its express terms may be sufficient in form to convey to a railroad company the fee simple title to the property described therein, subject to reversion upon breach of the limitation or condition subsequent contained therein.[3]

Appellants cite the cases of *Highland Realty Co. v. City of San Rafael,* 46 Cal. 2d 669, 298 P.2d 15 (1956); *City of Glendora v. Faus,* 148 Cal. App. 2d 920, 307 P.2d 976 (1957); and *Tamalpais, etc. Co. v. Northwestern Pac. R.R.,* 73 Cal. App. 2d 917, 167 P.2d 825 (1946), in support of their contention that an easement for railroad purposes was conveyed by the August 6, 1890 deed. In the *Highland Realty*

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3. In the following cases, the California courts held the deeds involved conveyed fee simple title subject to conditions subsequent. *Hannah v. Southern Pac. R.R.,* 48 Cal. App. 517, 192 Pac. 304 (1920); *Behlow v. Southern Pac. R.R.,* 130 Cal. 16, 62 P.2d 295 (1900); *Rosecrans v. Pacific Electric Ry.,* 21 Cal. 2d 602, 134 P.2d 245 (1943); *Moakley v. Blog,* 90 Cal. App. 96, 265 Pac. 548 (1928); *Goodman v. Southern Pacific Co.,* 143 Cal. App. 2d 424, 299 P.2d 321 (1956).

case, the railroad company filed an action in eminent domain to acquire a "right of way for the construction and use of the railroad upon, over and along a strip of land." Prior to trial of the action, the defendant conveyed the property by a deed which described the property in the same language used in the eminent domain complaint. In such circumstances, the court determined the parties intended that an easement be conveyed by such deed inasmuch as the railroad company was only entitled to acquire an easement by the condemnation action. In the *City of Glendora* case, the deed to the railroad company contained the following language in the granting clause: "The said party of the first part, *doth hereby, grant, bargain, sell and convey,* unto the said party of the second part, *for railroad purposes only, and* subject to the conditions hereinafter specified, all those certain pieces or parcels of land." The court in holding that an easement was granted by such deed distinguished the cases of *Hannah v. Southern Pac. R.R., supra, Behlow v. Southern Pac. R.R., supra,* and *Moakley v. Blog, supra,* in that such deeds contained statements concerning the purposes of the grants appearing in parts other than the granting clauses thereof. The deed involved in the *Tamalpais* case, *supra,* stated in the granting clause that the grantor "does grant unto the said party of the second part . . . for the uses and purposes hereinafter designated and stipulated and none other," the land described therein, "for the maintenance and operation of a railroad. . . ." The court concluded it was not necessary for purposes of its decision in the case to decide the nature of the estate conveyed by such deed.

In any event, inasmuch as the trial court found and determined appellee did not breach the provisions contained in the August 6, 1890 deed, it was not necessary for the trial court to determine the nature of the title conveyed

thereby. To such extent, the situation is analogous to the circumstances in the *Tamalpais* case, in which it was determined the railroad company did not breach the provisions contained in its acquisition deed and it was therefore not necessary to determine the nature of the title conveyed by such deed.

On page 23 of their opening brief, the appellants refer to the recital of a consideration of $1.00 in Railroad's acquisition deed. It is a matter of common knowledge, of which this court will take judicial notice, the amount of consideration stated in deeds is nothing more than a recital and does not disclose the true consideration received therefor. The grantors in the August 6, 1890 deed received a valuable consideration for their conveyance of the depot grounds, namely, the benefit derived from increased value of their adjoining property due to the construction of the San Ramon Branch Railroad. The deed was delivered to appellee's predecessor in interest in consideration of its construction of such railroad line, in compliance with the agreement of the grantors to do so upon completion of such railroad line (Ex. B).

Even though it is determined the above deed contains a provision subjecting the title acquired to reversion upon breach of the deed provision contained therein, it is settled law where the forfeiture of an estate conveyed for a specified purpose is by the terms of the deed predicated upon cessation of such specified purpose, an additional and different use of the property will not effect a forfeiture of such estate as long as the specified use is continued.[4]

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4. *Reclamation District v. Van Loben Sels,* 145 Cal. 181, 78 Pac. 638 (1904); *Lowe v. Ruhlman,* 67 Cal. App. 2d 828, 155 P.2d 671 (1945); *City of Santa Monica v. Jones,* 104 Cal. App. 2d 463, 232 P.2d 55 (1951); *Kouwenhoven v. New York Rapid Transit Corp.,* 9 N.Y.S. 2d 629, *aff'd* 24 N.E. 2d 485, 25 N.E. 2d 147 (1940);

> "The proprietor of a determinable, qualified, or base fee has the same rights and privileges over his estate, until the qualification upon which it is limited is at an end, as if he were a tenant in fee simple." 19 Am. Jur., *Estates* § 30 (p. 490).
>
> "Until its determination, a base, qualified, or determinable fee has all the incidents of a fee simple. . . ." 31 C.J.S., *Estates* § 10 (p. 23).

So long as appellee maintains its railroad line and depot at Walnut Creek in fulfillment of the purpose for which the land described in the August 6, 1890 deed was originally conveyed, appellee is entitled under such established principle of law to use and authorize others to use portions of the depot grounds for all purposes consistent with the maintenance and operation of the railroad line. There is no express obligation in the August 6, 1890 deed or under applicable law requiring appellee to restrict the issuance of leases for such purposes for a term less than five years. The case of *Kouwenhoven v. New York Rapid Transit Corp.,* 9 N.Y.S.2d 629, 24 N.E. 2d 485, 25 N.E. 2d 147, *supra,* involved the lease of railroad property for the term of 25 years for the maintenance of a store building, subject to the right of the railroad company to terminate lease at the end of the fifth, tenth, fifteenth or twentieth year of the term by giving one year's notice. The court held that the

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Priddy v. School Dist. No. 78, 219 Pac. 141 (Okla. 1923); *Lawson v. Georgia Southern & F. Ry.,* 82 S.E. 233 (Ga. 1914); *Hilton v. Central of Georgia Ry.,* 92 S.E. 642 (Ga. 1917); *Carlsen v. Carter,* 36 N.E. 2d 740, 137 A.L.R., commencing at page 639 (Ill. 1941); *Thompson on Real Property* (Perm. Ed.), Sec. 2104; *Regular Predestinarian Baptist Church v. Parker,* 27 N.E. 2d 522 (Ill. 1940); *Williams v. McKenzie,* 262 S.W. 598 (Ky. 1924); *Davis v. Skipper,* 83 S.W. 2d 318 (Tex. 1935); *Taylor v. Continental Southern Corp.,* 131 Cal. App. 2d 267, 280 P.2d 514 (1955); *City of Long Beach v. Marshall,* 11 Cal. 2d 609, 613, 82 P.2d 362 (1938).

entering into such lease did not constitute a breach of a deed provision which provided that the estate granted was subject to reversion whenever the same shall cease to be used for railroad purposes.

In discussing a case involving the conveyance of fee simple title to property on condition subsequent, the California Supreme Court stated in *Parry v. Berkeley Hall School Foundation,* 10 Cal. 2d 422, 426, 74 P.2d 738, 740 (1937), as follows:

> "The grantee takes the entire estate of the grantor, and unless he breaches the conditions is in the same position as an owner in fee simple absolute."

In *City of Santa Monica v. Jones,* 104 C.A. 2d 463, 232 P.2d 55, *supra,* the grantors made claim for compensation based on a reversionary interest in a deed to the Pacific Electric Railway Company. The condition of the deed was that the property should revert to the grantors, their heirs or assigns, (1) whenever the property shall not be used for railroad purposes, or (2) whenever the Railway Company shall cease to run daily passenger trains over the railroad, or (3) whenever any structure of any kind is erected by the Company on the property, except depots and such other structures as may be needed strictly for railroad purposes. The Railway Company had not run railroad passenger trains over the line for many years, but neither the grantors nor their heirs ever claimed a breach of the condition until after commencement of the condemnation suit. The heirs contended that the condition was breached in that the Company for a period of about twenty-five years had for a consideration permitted a signboard company to erect and maintain advertising signboards on the property removable upon twenty-four hours' notice. The

heirs also contended that the Railway Company since 1937 had leased from month to month a part of the property to a bus company for the purpose of parking buses, which was contrary to the condition that the property should not be used for any other purpose but railroad purposes. The Court declined to raise this type of an alleged breach to the dignity of a breach giving rise to a forfeiture, saying at p. 470:

> ". . . Moreover, as there is no showing by the heirs that they or their predecessors ever objected to the use of the property to park busses or place signboards thereon we see no occasion to grant any relief, whether they knew or did not know of the alleged violations. If they were not interested enough to check the property for violations, the violations must be regarded as altogether too minor to warrant forfeiture of a fee property, where, as here, it does not appear that any harm or benefit could accrue to the heirs. After all the law does not regard mere trifles as a basis for forfeiture."

In *O'Brien v. New York, N. H. & H. R. R.*, 179 N.Y.S. 160 (1919), the deed contained the following condition and restriction defining and limiting the use by the grantee of the parcel conveyed:

> "To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, their successors or assigns, forever, but only on the condition that the above described land shall be used for railroad purposes, to wit, *for the purpose of a passenger and freight depot and depot grounds and for the approaches thereto,* and in case at any time hereafter the premises shall cease to be used for the purposes aforesaid, then the title thereto shall revert to the said parties of the first part, their heirs and assigns."

Subsequent to receiving title to the tract of land in question, the railroad company occupied the premises for various purposes. It erected thereon a passenger station, a two-story frame building used as a storehouse, a one-story frame building for use as a power house for generating electricity to be used in raising and lowering a nearby drawbridge, but at the time of the trial was then used for storage purposes. It also erected a one-story sheet iron shop, a hydrant and hose building, a small tool house and other facilities in addition to the passenger station. The railroad company also constructed tracks upon the land for handling express trains, also another track which was used as a siding. No freight house or freight depot was ever erected upon the premises in question. The plaintiff sought to avail herself of the reversion clause contained in the deed because the premises in question had ceased to be used for the purposes mentioned in said deed. The Court said (179 N.Y.S. 160, at pp. 163-64):

> "In making the erections complained of, to some extent, at least, the appellant clearly exceeded any right or authority conferred by said deed. . . .
>
> "However, it is not necessary upon this appeal to determine whether or not the defendant railroad company exceeded its authority in making such erections. The question here is whether, under the deed to defendant, the premises conveyed have ceased to be used for the purposes contemplated, so that title has reverted to the original grantors and their heirs. Concededly the grantee has used said premises, or a portion thereof, for some of the purposes expressly mentioned in the deed, to wit, for the purpose of a passenger depot and depot grounds and for appoaches thereto, and for such purposes is still using the lands conveyed by plaintiff's ancestor and his cograntor.

> "Respondent's position is . . . that by the unwarranted erections on the land the grantee forfeited all right thereto. I am unable to see the force of such contention. It does not seem to me that, by reason of doing more than it was permitted to do under its deed, the defendant necessarily forfeited title to the premises. ...
>
> "In other words, it was the plain intent of the parties that, when the premises should cease to be used for the purpose of a passenger and freight depot and depot grounds and for the approaches thereto, then the premises should revert to the grantors, their heirs and assigns. Such a contingency has not as yet arisen, as the premises are still occupied by the grantee for its passenger depot and depot grounds and for the approaches thereto.
>
> "I think the plaintiff has entirely mistaken her remedy, and that under existing conditions ejectment will not lie. The premises have not as yet ceased to be used for some of the purposes described in the deed, and until the premises have ceased to be used for such purposes there can be no reversion of title."

As long as some part of the property is used for the purposes specified in the condition and the remainder is held and protected for the uses specified and contemplated, there is no breach of the condition and mere non-user is not evidence of abandonment. *Home Real Estate Co. v. Los Angeles Pacific Co.,* 163 Cal. 710, 126 Pac. 972; *Ocean Shore R.R. v. Spring Valley Water Co.,* 87 Cal. App. 188, 262 Pac. 53. There is no provision in the August 6, 1890 deed requiring the property described therein to be used and occupied only for railroad purposes. Likewise, there is no obligation on appellee's part to use every square foot of the depot grounds for railroad purposes. *Goodman v. Southern Pacific Co.,* 143 Cal. App. 2d 424, 299 P.2d 321, *supra.* On the other hand, there is a strong and prevailing policy

in the law which favors property being placed to productive use. Where property is dedicated to public use for railroad purposes, it is in the interest of all concerned that the railroad company be permitted to lease such portions of its property as may be available for other interim uses to offset taxes and administrative expenses incurred during the period such property is held and kept available for future railroad requirements. In the *Goodman* case, the trial court held that Southern Pacific Company was entitled to the exclusive possession of the property, together with the right to use the property for any and all lawful purposes as long as use of the property for railroad purposes is not obstructed or interfered with. The California District Court of Appeals, in affirming the trial court judgment, did not disapprove such holding of the trial court.

The California courts have consistently held that construction of a railroad facility on a portion of its property is sufficient for the railroad company to retain the right to possession and use of the entire parcel of land granted for railroad purposes. The rule is that the possession of part of a railroad right of way is possession of the whole.

In *Southern Pacific Co. v. Burr,* 86 Cal. 279, 24 P. 1032, (1890), involving a portion of railroad right of way acquired under an Act of Congress, the Court states on page 284:

> "Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true, the strip of land now actually occupied by the road-bed and telegraph line may be only a small part of the four hundred feet

> granted, but this fact is of no consequence. The company may at some time want to use more land for sidetracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so."

Southern Pacific Co. v. Hyatt, 132 Cal. 240, 64 P. 272, (1901), is another case involving railroad right of way, where the Court stated on page 244:

> "The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track constantly in use is a definite badge of ownership, and the only practical assertion of title that can be made."

The testimony of witness John N. Cetinich touched upon some of the contemplated changes in railroad operations which affect the San Ramon Branch (R.T. 68-73). Appellee must be permitted to retain ownership of its depot grounds at Walnut Creek for railroad purposes in order to provide service as required to the public as a common carrier. To the extent appellee is so obligated to serve the public, it has correlative rights to lease its property for other interim uses to defray the expense of holding its property available in order that it may be in a position to fulfill such obligation. Considering all the circumstances involved, it is submitted that appellee has not committed a breach of the provisions in the August 6, 1890 deed sufficient to invoke a forfeiture of its title to the property involved herein.

C. ANALYSIS OF THE CLAUSE "CEASE TO OCCUPY SAID PREMISES FOR RAILROAD PURPOSES" CLEARLY INDICATES, AS THE TRIAL COURT FOUND, THAT THERE HAS BEEN NO BREACH OF THE PROVISION CONTAINED IN THE AUGUST 6, 1890 DEED.

The words in the above quoted clause are very narrow in application and do not support appellants' contention the deed provision herein involved has been breached.

1. Cease.

The question the court has to determine is whether the defendant Southern Pacific Company has *ceased to occupy the premises for railroad purposes.*

The meaning of the word "cease" is found at 11 C.J., *Cease* (p. 45), as follows:

> "Cease. To put a stop to; to be done away with; to be an extinction.[19]"

Note 19 above cites the California case of *Thomason v. Ruggles,* 69 Cal. 465, 470, 11 Pac. 20 (1886), which is as follows:

> "To cease is to put a stop to; to be done away with; to be an extinction (Webs. Dic.)."

The definition of the word "ceased" applies to an extinction of the use for railroad purposes, or a permanent abandonment rather than a mere temporary cessation. It is not a broad word, but narrow in application. In applying the definition of "ceased" to the facts, one must ascertain whether the use for railroad purposes has been done away with or come to an end, that is, is it extinct, or is the railroad use still possible? Also from the definitions hereafter set forth, there also must be a discontinuance and an abandonment of a permanent nature rather than a mere temporary cessation. All of these matters point out the narrow application of the word "cease". For appellants to prevail, they must first prove that the use of the land in question for railroad purposes is extinct or has come to an end. Appellants cannot show such a factual situation since the opposite is true, for the railroad has used and has the right and duty to put the property to use for railroad purposes when the need arises.

Further discussion of the meaning of the word "cease" is found in the text at 14 C.J.S., *Cease* (p. 58), as follows:

"In its intransitive sense, it has been defined as meaning to be done away with or to be an extinction; to become extinct or pass away; to come to an end, or stop. In its transitive sense, to put a stop to; to stop or put an end to.

" 'Cease' has been contrasted with 'continue,' and, in a particular connection, distinguished from 'vacate and dismiss.' It has been said that 'cease' is generally used to indicate cessation of activity rather than to describe an activity in opposition to that then existing; that it implies a prior existence, a discontinuance, *and permanent abandonment rather than mere temporary cessation;* and, under some circumstances, a discontinuance of purpose as distinguished from a cessation of physical existence." (Emphasis supplied.)

2. Railroad Purposes.

The meaning of the words "railroad purposes" can be best determined from the cases construing the same. To understand what is a railroad purpose, it is to be remembered a railroad has two primary functions, the first, to move its traffic, that is, operate its cars upon its tracks, and the second, to provide facilities for the proper loading, unloading, and dispatch of the cars. Also it seems obvious that a railroad should plan for the future as well as the present. A railway may use its railroad easement for delivering and loading facilities and supporting businesses.

As said in one text, 74 C.J.S., *Railroads,* § 99 (p. 500):

". . . a railroad company may use land acquired by it for a right of way for the erection of a freight depot, warehouse, water tanks, necessary side tracks and switches, turntables, and other structures or buildings necessary or proper for facilitating the transaction of its ordinary business."

Further, see 74 C.J.S., *Railroads*, § 101 (p. 508), as follows:

> "... a railroad company may permit the erection of warehouses, elevators, or other buildings or platforms thereon for convenience in delivering and receiving freight. ..."

Also, the text in 44 Am. Jur., *Railroads*, § 131 (p. 345) states:

> "Generally, a railroad may permit persons to carry on business or render services incidental to its railroad business, on its property, where it could perform such business or services itself."

That a railroad right of way may be leased for lumber yards as well as grain elevators, stock yards, warehouses, and other supporting businesses, under an easement restricting it to use for railroad purposes, is a proposition supported by numerous authorities.

Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70, 65 N.W. 136, 30 L.R.A. 534, 536;

Grand Trunk R.R. v. Richardson, 91 U.S. 454, 23 L.Ed. 356, 361;

Illinois Central R.R. v. Wathen, 17 Ill. App. 582, 590;

Michigan Central R.R. v. Bullard, 120 Mich. 416, 417, 79 N.W. 635.

In *City of Long Beach v. Pacific Electric Ry.*, 44 Cal. 2d 599, 603, 283 P.2d 1036 (1955), the California Supreme Court said:

> "But a railroad may use its right of way for many commercial purposes unless specifically prevented from so doing. For example, the following uses for a railroad right of way have been held to be proper since they contribute to the railroad's business: a sawmill, lumber shed, store or boarding house (*Grand Trunk*

R.R. v. Richardson, 91 U.S. 454 [23 L.Ed. 356]); a manufacturing company (*Michigan Cent. R. Co. v. Bullard,* 120 Mich. 416 [79 N.W. 635]); a grain elevator and warehouse (*Gurney v. Minneapolis Union Elevator Co.,* 63 Minn. 70 [65 N.W. 136, 30 L.R.A. 534]); a lumber yard, corn crib, grain elevator and warehouses (*Illinois Cent. R. Co. v. Wathen,* 17 Ill. App. 582).

"Since railroads may use their rights of way for certain commercial activities, the taking of a portion of it which is being used, *or is capable of being used, for commercial purposes* in order to create or extend a public street, ordinarily would cause more than nominal damage to the railroad." (Emphasis added.)

Thus, the California courts in the use of the phrase "which is being used, or is capable of being used for commercial purposes", considers not only present, but also future use.

The cases of *Sparrow v. Dixie Leaf Tobacco Co.,* 61 S.E. 2d 700 (1950), *Bond v. Texas and Pacific Ry.,* 160 So. 406 (1935), and *Connolly v. Des Moines and Central Iowa Ry.,* 68 N.W. 2d 320 (1955), cited by appellants in their opening brief, represent the minority view with respect to the use a railroad company is permitted to make of its railroad right of way. Inasmuch as the California Supreme Court has decided this matter in accordance with the majority view, this court should follow the view of the California court with respect to such matter where it is clearly expressed as in the case of *City of Long Beach v. Pacific Electric Ry.,* 44 Cal.2d 599, 283 P.2d 1036, *supra.*

3. Occupy.

The basic language under consideration in the deed is "cease to *occupy* said premises for railroad purposes".

That defendant is keeping the land in question for future use for railroad purposes is obvious.

The California case of *People v. Ines,* 90 Cal. App. 2d 495, 498, 203 P.2d 540, 542 (1949), pointed out:

> "In *People v. Roseberry,* 23 Cal. App.2d 13, 14 [71 P.2d 944], the word 'occupy' is defined as follows: '... To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; *to tenant;* to do business in' (citing Webster's New Intl. Dict., 1921)." (Emphasis supplied.)

In *Grillo v. Maryland,* 120 A.2d 384, 388, 209 Md. 154 (1956), it was said:

> ". . . 'To occupy' means to hold in possession; *to hold or keep for use.* Missionary Society of Methodist Episcopal Church v. Dalles City, 107 U.S. 336, 2 S.Ct. 672, 27 L.Ed. 545." (Emphasis added.)

The word "occupy" has so many meanings it is difficult to apply any particular meaning unless the facts are specifically studied. This matter was pointed out in *Richards v. Sellers,* 104 Cal. App. 30, 32, 285 Pac. 391, 392 (1930), as follows:

> "The words 'occupied' and 'unoccupied' have many meanings. ... Each case must stand on its own facts."

4. Said Premises.

The meaning of the words "said premises" is clear in this case. It refers to the entire 4.04-acre parcel of land described in the August 6, 1890 deed. There is no limitation, express or implied, that the words shall apply to the portions of the parcel of land which are described in the complaint as Parcel One. The fact that a railroad depot has been constructed on the depot grounds and has been continuously maintained and operated and that the remainder of such property has been kept available for required rail-

road use is sufficient performance on appellee's part to fulfill the requirements of the deed provision. In the case of a railroad right of way, it has been held the presence of one track thereon is a sufficient badge of ownership of the entire width of the right of way, even though portions thereof are not occupied by rail facilities. *Southern Pacific Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, *supra*.

The words "said premises" in the provision contained in the August 6, 1890 deed clearly refer to the whole of the property described therein. If the grantors intended such provision should apply to only a portion of the property, they could have easily so provided in the deed. It is not the function of this court to interpret the deed to give a meaning thereto which is accomplished by rewriting it. *Foley v. Euless*, 214 Cal. 506, 6 P.2d 956 (1931).

In this case, the grantors in the above deed, by an instrument dated August 31, 1890 (Ex. B), agreed to convey to the Southern Pacific Railroad Company all necessary lands for the right of way and depot grounds for the San Ramon Branch Railroad. It is obvious the grantors knew that only a small portion of the depot grounds at Walnut Creek would be occupied by the depot constructed thereon and the remainder of the property would be held and used for such other purposes as the railroad company authorized consistent with its requirements. There have been in effect during the period of appellee's ownership of such depot grounds a substantial number of leases covering its use for varied purposes (Exs. A-D to A-N inclusive). Portions of the depot grounds have been used for lumber and shingle yard purposes (Exs. A-D, A-E, A-K and A-L), for storage of rock, sand and gravel (Ex. A-F), for storage of poles and pipes (Exs. A-G, A-H, A-I and A-J), and for cultivation purposes (Ex. A-N). The fact the grantors and their

heirs did not object to leases for various purposes, entered into by appellee prior to the lease involved in this action, shows they intended and acknowledged that appellee was and should be entitled to lease the depot grounds for any and all purposes so long as the railroad line and depot were maintained at Walnut Creek. Appellee has carried out the intent of the parties to the August 6, 1890 conveyance by faithfully maintaining its railroad line and depot at Walnut Creek as shown by the affidavit of A. S. McCann (Ex. Z). The evidence shows that appellee has paid all taxes assessed against the depot grounds as stated in the affidavit of F. B. Magruder (Ex. Y). The evidence further shows a substantial volume of rail shipments has been handled at the Walnut Creek depot (Exs. A-Q and A-R).

In face of the above evidence, it is apparent the doctrine of partial reversion is not applicable to the property conveyed by the August 6, 1890 deed. The hypothetical situation mentioned on page 31 of appellants' opening brief has no bearing in this matter. The facts of this case speak for themselves and show clearly that the dominent purpose for which the depot grounds were conveyed has been complied with and fulfilled by the construction and maintenance of the railroad line and depot at Walnut Creek. The law is clear that, so long as appellee continues to maintain its railroad line and depot at Walnut Creek, appellee's interest therein is equivalent to fee ownership and it is entitled to use such portions of the depot grounds for any and all purposes not inconsistent with maintenance of the depot thereon for so long as the railroad line and depot are, in fact, maintained at Walnut Creek.

Appellants refer to the case of *Tamalpais Land and Water Co. v. Northwestern Pac. R.R.*, 73 Cal. App. 2d 917, 167 P.2d 825, *supra*, where it is stated some courts have held that a partial abandonment extinguishes so much of

a granted right as may have been abandoned. The case of *Atlantic Coast Line R.R. v. Sweat,* 177 Ga. 698, 171 S.E. 123 (1933), which is referred to in the *Tamalpais* case, involves a deed granting an easement for railroad purposes, subject to the provision that the property conveyed would "revert to the said party of the first part whenever said road shall be abandoned." On page 129 of the decision, the court states:

> ". . . Upon a proper construction of the contract, the word 'road' should be held to mean that part of the railroad to be constructed through the land lot in question, and not the entire line of railroad of the grantee; and the word 'abandoned' should be interpreted in the light of the other language used, and not in a technical sense. Upon a construction of the whole instrument with a view of ascertaining the intention of the parties, a failure to 'maintain and use said road' as above defined would constitute an abandonment within the purview and meaning of the particular agreement. While the nonuser alone will not ordinarily constitute an abandonment, the parties to the grant here under construction virtually contracted that a nonuser would amount to such."

After stating that an entire contract may be apportioned in some cases, the court continues, on page 130 of the decision, as follows:

> "This case is distinguished from the cases relating to apportionment, relied on by counsel for the railroad company, in none of which was the easement founded upon a contract of the character of the one here under consideration."

The holding in the *Atlantic* case is not applicable to the facts in the case at hand inasmuch as property interest therein was an easement subject to abandonment rather

than a fee title subject to reversion and was based upon interpretation of a particular deed provision in which the court departed from the generally accepted principle that a contract is entire and not divisible.

Appellants also refer in their opening brief to the case of *Virginia Ry. v. Avis*, 98 S.E. 638 (1919), relating to the doctrine of partial reversion. However, this case is not concerned with reversion of title, but deals with the question of whether the grantor is entitled to enforce a covenant in a deed providing that the land conveyed shall be used for a depot and facilities connected therewith. In view of the language in such deed provision, the court held that the land owner was entitled to enjoin the use of land for a purpose other than that which was stated in such deed provision. The court refers to the case of *Bolling v. Petersburg*, 8 Leigh (35 Va.) 224, where the intention of the grantors in the deed there involved was to require the maintenance of a court house on the land conveyed and not to further restrict its use. The court found that the distinction between the *Bolling* and *Avis* cases is plain. In the *Bolling* case, the intention of the parties was to require the use which should be made, while in the *Avis* case, the intention of the parties was to specify the use which might be made. The court stated, at page 641 of the *Avis* case:

> "This, we think, is the true distinction between the two cases. If the deed from Avis had said that the land was conveyed on condition that a depot should be erected and maintained thereon, then it would be simple and easy enough to say that there was no restriction upon the use of any part of the land not needed for the depot; but the language of the covenant which actually was embodied in the deed seems to us to plainly limit the use of the additional land to facilities connected with the depot."

The facts in the *Bolling* case are analogous to the facts in the case at bar and substantiate appellee's position in this matter in accord with the great weight of authority that in the case of a grant of an estate by a deed for a specified purpose (construction, maintenance and operation of a railroad line and depot herein), by the terms of which termination of the estate is predicated upon cessation of the specified use of the property, an additional and different use made of the property will not affect a forfeiture or termination of the estate granted so long as the specified use is continued. Under this established principle of law, appellee is entitled to lease the depot grounds at Walnut Creek, consistent with its authority to do so under regulatory statutes, so long as the railroad line and depot at Walnut Creek are maintained.

D. THE HOLDING IN THE CASE OF McDOUGALL V. PALO ALTO SCHOOL DISTRICT, 212 ADV. CAL. APP. 420 (1963), DISCUSSED ON PAGES 34 AND 35 OF APPELLANTS' OPENING BRIEF, IS NOT INCONSISTENT WITH THE TRIAL COURT'S FINDINGS IN THIS CASE.

In the *McDougall* case, the District removed all school buildings in 1940 from land acquired under a deed providing the title thereto would revert to the grantor if the District failed to use the land for common school purposes. The District did not make any further use of all the land for school purposes. The deed expressly provided it was given for the purpose of furnishing a site for a schoolhouse and to be used as a public school for the sole use and benefit of the School District. It is thus readily apparent the circumstances in the *McDougall* case and the case at hand are not similar.

II. Appellants Are Not the Owners of the Parcel in Question and They Are Not Entitled to Maintain This Action.

A. THE APPELLANTS ARE NOT THE OWNERS OF PARCEL ONE DESCRIBED IN THE FIRST AMENDED COMPLAINT.

The trial court found (finding X) the grantors in the August 6, 1890 deed and their heirs disposed of all their lands which adjoined Parcel One and properly concluded (conclusion V) the appellants "do not have an enforceable right, claim or interest in the further compliance on the part of defendant (appellee) or those claiming under defendant with the conditions contained in said deed." The trial court further found (finding V) that the August 6, 1890 deed conveying the depot grounds was delivered to appellee's predecessor in interest in consideration of the benefit to the grantors' adjoining land and their ownership thereof as a result of the construction of the San Ramon Branch Railroad. Inasmuch as such grantors and their heirs no longer own the lands adjoining such depot grounds, the above benefit to their ownership of adjoining lands has ceased by reason of such disposition. It is a maxim of California jurisprudence "where the reason is the same, the rule should be the same" (section 3511 of the Civil Code of the State of California). Since appellants no longer own the adjoining land to receive benefits thereof, appellants no longer have reason to enforce the provisions contained in the August 6, 1890 deed for continuation of benefits derived therefrom. In the circumstances, the trial court's conclusions are correct and in accordance with its findings.

B. APPELLANTS AND THEIR PREDECESSORS IN INTEREST HAVE CONVEYED TO OTHERS THE LAND ADJACENT TO THE DEPOT GROUNDS BY DEEDS IN WHICH THE PROPERTY DESCRIPTION "CALLED" THE "RAILROAD RIGHT OF WAY."

Appellee's engineer testified "the call on each of the sale deeds was to the Southern Pacific right of way" (R.T. 29, lines 12, 13). In the case where monuments are inconsistent with measurements, the monuments are paramount. When a road is the boundary, the rights of the grantor to the middle of the road are included in the conveyance (section 2077, Code of Civil Procedure of State of California). Calls to monuments prevail over measurements. *Ferris v. Coover,* 10 Cal. 589, 629 (1858); *Weaver v. Howatt,* 161 Cal. 77, 80, 118 Pac. 519, 520 (1911).

On page 38 of their opening brief, appellants contend the Walnut Creek station grounds can not be properly referred to as a "railroad right of way" for purposes of applying the "highway rule", namely, that a conveyance of land adjoining such right of way carries with it the interest of the grantor to the center line of the right of way. However, the facts in this case show the grantors and their heirs, in conveying to others their adjacent land, referred to such station grounds as "railroad right of way" in the deed descriptions. As the trial court aptly states, "the deeds should speak for themselves" (R.T. 30, line 20). Since the appellants and their predecessors in interest chose to refer to the station grounds as "railroad right of way" and also chose to "call" such "right of way" in the descriptions of the property conveyed to others by their deeds, they are estopped to assert the station grounds should not be referred to as railroad right of way for purposes of the "highway rule."

The general rule is that conveyances of lands bounded by railroad rights of way are construed in the same manner

as conveyances of lands bounded by streets, highways, or non-navigable streams, as conveying the interest of the grantor therein.[5] Railroad rights of way are considered to be highways dedicated to a public use.[6]

There is a strong public policy against construing deeds in a manner which will leave in the grantor title to long, narrow slivers and strips of land of no use to him, creating a source of future litigation.[7] The conveyance by the appellants and their predecessors in interest of the land adjoining such railroad right of way carried with it all of their interest therein.

California courts have held that it serves no practical purpose and would be inequitable to invoke a forfeiture of title where the holder of the right of re-entry is not the owner of an interest in the adjoining lands.[8]

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5. *Rio Bravo Oil Co. v. Weed,* 50 S.W.2d 1080, 1084-85 (Tex. 1932), *cert. denied,* 288 U.S. 603 (1933); *Center Bridge Co. v. Wheeler & Howes Co.,* 86 Atl. 11, 12 (Conn. 1913); *Roxana Petroleum Corp. v. Sutter,* 28 F.2d 159, 161, 162 (8th Cir. 1928); *Obringer v. Minnotte Bros. Co.,* 42 A.2d 413 (Pa. 1945); *Pyron v. Blanscet,* 238 S.W.2d 636, 637 (Ark. 1951); *New Orleans & Northwestern R.R. v. Morrison,* 35 So.2d 68 (Miss. 1948); *Oklahoma City v. Dobbins,* 117 P.2d 132 (Okla. 1941); *Broderick v. Tyer,* 187 S.W.2d 476 (Mo. 1945); *Boney v. Cornwell,* 109 S.E. 271, 274 (S.C. 1921); *Joslin v. State,* 146 S.W. 2d 208, 210 (Tex. 1940); *Talbot v. Massachusetts Mut. Life Ins. Co.,* 14 S.E. 2d 335, 337 (Va. 1941); *Church v. Stiles,* 10 Atl. 674, 675 (Vt. 1887); *Eureka Real Est. & Inv. Co. v. Southern Real E. & F. Co.,* 200 S.W. 2d 328, 333 (Mo. 1947).

6. 2 Cal. Jur. 2d, *Adverse Possession* § 13 (p. 512); *San Francisco, A. & S. R.R. v. Caldwell,* 31 Cal. 367, 371 (1866); *Southern Pacific Co. v. Hyatt,* 132 Cal. 240, 242, 64 Pac. 272 (1901); *Long Beach v. Payne,* 3 Cal. 2d 184, 189, 44 P.2d 305 (1935); 44 Am. Jur., *Railroads* § 8 (p. 220); 51 C.J., *Railroads* § 6 (p. 409).

7. *Brown v. Bachelder,* 214 Cal. 753, 755, 7 P. 2d 1027, 1028 (1932); *Anderson v. Citizens Savings & Trust Co.,* 185 Cal. 386, 197 Pac. 113 (1921).

8. *Alexander v. Title Insurance & Trust Co.,* 48 Cal. App. 2d 488, 119 P.2d 992 (1941); *Townsend v. Allen,* 114 Cal. App. 2d 291, 250 P.2d 292 (1952).

There is a strong presumption that upon conveyance of property adjoining a railroad right of way the grantor intends to convey his interest in the adjoining railroad right of way.[9]

The common law presumption was discussed in *Anderson v. Citizens Savings & Trust Co.*, 185 Cal. 386, 394-96, as follows:

> "The authorities in which the exact situation found here is presented are not very numerous and are in conflict and it would be of little purpose to review them. They are collated in the note to *White v. Jefferson*, 110 Minn. 276, [124 N.W. 373, 125 N.W. 262], as reported in 32 L.R.A. (N.S.) 778. The question is considered at length and with great care by the United States circuit court of appeals for the sixth circuit in *Paine v. Consumers' etc. Co.*, 71 Fed. 626, [19 C.C.A. 99], Judge Taft delivering the opinion. Among the reasons advanced by the opinion in support of the view which it adopts is the following, the force and good sense of which are sufficient, it seems to us, to resolve any doubt in the matter. It is said (page 632):
>
> > 'The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases. For a very good state-

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9. *Anderson v. Citizens Savings & Trust Co.*, 185 Cal. 386, 392, 393, 394, 395, 197 Pac. 113 (1921); *Brown v. Bachelder*, 214 Cal. 753, 7 P.2d 1027 (1932); *Roxana Petroleum Corp. v. Sutter*, 28 F.2d 159 (8th Cir. 1928); *Pyron v. Blanscet*, 238 S.W. 2d 636 (Ark. 1951); *New Orleans & Northwestern R.R. v. Morrison*, 35 So. 2d 68 (Miss. 1948); *Oklahoma City v. Dobbins*, 117 P.2d 132 (Okla. 1941); *Boney v. Cornwell*, 109 S.E. 271 (S.C. 1921); *Obringer v. Minnotte Bros. Co.*, 42 A.2d 413 (Pa. 1945).

ment of the present condition of the law on the subject, reference may be had to the new and valuable work of Mr. Dembitz on Land Titles, section 11. Most of the decisions are rested on some peculiarity of phrase in the description, and it is very difficult to lay down any general rules for determining when the grantor has used language sufficiently explicit to exclude from the operation of the deed the fee to the center of the abutting road. The supreme judicial court of Massachusetts has decided that it is impossible, if any respect is to be paid to the principles of the common law of real estate, to hold that a fee in land not described can pass as appurtenant to that which is described. (*Tyler v. Hammond,* 11 Pick. (Mass.) 193.) But in the later case especially that court has used every device of logic to include in the description of a lot by the side of a road the fee to the center of the road. It has treated the highway or private way in the description of a lot as a monument, and in obedience to the rule that a reference to monuments controls descriptions by courses and distances it has carried the lot to the center line of the monument, however clear a departure this may be from the linear or superficial measurements. It would seem from the language of Mr. Justice McLean, speaking for the supreme court of the United States in *Barclay v. Howell,* 6 Pet. 512, [8 L. Ed. 498], that the difficulty of passing the fee in the adjoining street as appurtenant to the conveyance of the abutting lot did not weigh so heavily on that court, for he said:

> "'"Where the proprietor of a town disposes of all his interest in it, he would seem to stand in a different relation to the right of soil, in regard to the streets and alleys of the town, from the individual over whose soil a public road is established, and who continues to hold the land on both sides of it. Whether the purchasers are not, in this re-

> spect, the owners of the soil over which the streets and alleys are laid, as appurtenant to adjoining lots, is a point not essentially involved in this case."
>
> 'The whole question is most exhaustively discussed by the learned American editors of Smith's Leading Cases (8th ed., vol. 2, p. 178) in the notes of *Dovaston v. Payne,* and the conclusion reached that the treatment of the highway as a monument furnishes the means to include the fee to the street center in every case where there is not express language excluding it. (See, also, 3 Kent's Com. 349.) The wisdom of such a construction is manifest, and the great weight of authority sustains it.' "

The majority rule in the United States is that a conveyance of land bounded by a railroad right of way ordinarily passes the fee to the center thereof, if the grantor owns so far. (11 C.J.S., *Boundaries* § 45 (p. 594). See also *Roxana Petroleum Corp. v. Sutter,* 28 F.2d 159; *Rio Bravo Oil Co. v. Weed,* 50 S.W. 2d 1080; *Talbot v. Massachusetts Mut. Life Ins. Co.,* 14 S.E. 2d 335, and cases referred to in those decisions.) These cases seem more convincing and reasonable than those such as *Stuart v. Fox,* 152 Atl. 413, which support the minority view.

Although it may be contended that, under Civil Code sections 831 and 1112, California is legislatively committed to the minority rule, these sections do no more than codify the rule already adopted by the court in *Kittle v. Pfeiffer,* 22 Cal. 484 (1863). Even if because of these sections the California rule on grants bounded by streets and highways is deemed entirely statutory, this does not mean that California does not follow the common law rule when the land is bounded by a railroad right of way. Any contention that

these sections were intended to restrict the rule to highways and exclude all other types of boundaries is belied by the fact that California follows the same rule as to center line (or thread of the stream) where the boundary is a stream or other non-navigable water course. (*Rubel v. Peckham,* 94 Cal. App. 2d 834, 211 P.2d 883 (1949).) *Canal Oil Co. v. National Oil Co.*, 19 Cal. App. 2d 524, 66 P.2d 197 (1937), does not purport to limit the rule to roads or streets only. While it does point out that the right of way in question was "a mere private easement", if that were the complete answer, there would be no reason for the court to refer to that portion of section 831 that provides "but the contrary may be shown" and to point out that the deeds in question clearly showed a contrary intent by express language in the deed calling the side of the canal right of way as a boundary line.

In so far as the streets are concerned, the presumption that the grant carries to the center of the street is highly favored in law. (*Brown v. Bachelder, supra; Anderson v. Citizens Savings & Trust Co., supra.*) It has been held that a grant describing a street as a boundary for property carries title to the center of the street, although the street was never dedicated and even though it had been abandoned before the deed referring to it as a boundary was made (*Machado v. Title Guarantee & Trust Co.*, 15 Cal. 2d 180, 99 P.2d 245 (1940)). These cases all adopt the reasoning and the authorities relied upon as establishing the majority rule as to railroad rights of way. The court in *Anderson v. Citizens Savings & Trust Co., supra,* at page 394, refers to the conflict of authority outside the state as to private ways. It makes no reference to the conflict having been resolved in California by the Code sections mentioned. The latter case aligns California with the jurisdiction following the ma-

jority rule, with the result that the majority rule is applicable in California to all cases, including railway rights of way.

It has been held that when the holder of a right of reentry has no interest in the adjoining lands and the condition was for the benefit of the adjoining land, it is not enforceable. In an action for declaratory relief and to quiet title to realty, the enforcement of a restriction as to the use of the realty was held to be inequitable due to changed conditions. *Alexander v. Title Ins. & Trust Co.*, 48 Cal. App. 2d 488, *supra.* In affirming the judgment which relieved the land from the operation of such restriction, the court said (pp. 492-93):

> ". . . This vendor, having sold the land and having left in its hands the bare reversionary right, is in the extraordinary position of being the owner of rights usually attributable to the owner of a dominant tenement, retaining them while selling the entire tract of land under restrictions which make them all servient to its bare and bodyless right. Being in this position, it has not concerned itself with the enforcement of this equitable right for the benefit of those landowners who purchased their property with a knowledge of and doubtless in reliance upon the restrictions in those earlier days when they appeared just and proper."

In *Townsend v. Allen,* 114 Cal. App. 2d 291, *supra,* the grantee in possession brought an action to quiet title against the holders of the reversionary interest, successors of the plaintiff's grantor. The defendants had acquired, but before this action had sold, the adjoining land. The plaintiff's land was subject to an express condition restricting its use. Judgment for the plaintiff was affirmed (pp. 294-95):

> "It may be conceded that where the Deysher deed stated the restrictions involved to be express conditions

and gave a right of reentry in case of violation without any indication that possible forfeiture was not intended by the parties, and where said restrictions were not unlawful or unreasonable, said conditions were, when made, valid and enforceable as written. (*Rosecrans v. Pacific Elec. Ry. Co.*, 21 Cal. 2d 602, 605 [134 P.2d 245]; *Wedum-Aldahl Co. v. Miller*, 18 Cal. App. 2d 745, 750 [64 P.2d 762].) However it does not follow from the character of said restrictions as conditions subsequent with right of reentry that said restrictions must be secure from attack in equity when *changed circumstances or prior conduct of the party seeking enforcement* has caused said enforcement to be purposeless or inequitable. In California cases such circumstances have long since led to avoidance of restrictions notwithstanding the fact that they were in the form of conditions subsequent. . . ."

In this case, appellants seek to recover a strip and gore that is long, narrow and has no access to outside world (R.T. 47). As far as access is concerned, obviously appellants can not put the strip to productive use. The strip of land was conveyed in consideration of the construction of a railroad line at Walnut Creek (Ex. B). The railroad line has been constructed and maintained (Ex. B). Appellants' predecessors have conveyed away their adjoining land (Ex. Y). It is therefore obvious appellants no longer have any interest in the property in question under the applicable rule of law as set forth at 19 Am. Jur., *Estates* § 91 (pp. 553-54):

"Where one conveys part of his land on condition subsequent that something be done which will benefit the rest of his property, a conveyance of the rest of his property is a waiver of the grantor's right to declare a forfeiture for breach of the condition subsequent."

The case of *Stevens v. Galveston H. & S. A. Ry.,* 212 S.W. 639 (1919), is directly in point in this matter. There the court held that the grantor was not entitled to invoke a forfeiture under a deed provision where the trial court found the grantor had conveyed away all the adjoining property intended to be benefited by the enforcement of the deed provision.

In their closing argument at page 41 of their opening brief, appellants refer to the case of *Goodman v. Southern Pacific Co.,* 143 Cal. App. 2d 424, 299 P.2d 321, *supra,* in which it was stated the reversionary rights under the particular deed involved shall remain in effect. However, the facts in the *Goodman* case were different than the case at hand, inasmuch as there was no evidence before the court nor any trial court finding the plaintiffs (owners of the reversionary interest) had disposed of their interest in adjoining lands, and for such reason the above statement in the *Goodman* case has no bearing on the matter at hand.

III. The "Law Abhors Forfeiture" and the Deed in Question Is to Be Construed So as Not to Cause a Forfeiture if at All Possible.

The general rule is that deeds shall be construed strictly against the enforcement of a forfeiture. It is well established that forfeitures are not favored in law and provisions providing therefor shall be construed strictly against the enforcement of a forfeiture.

The statutory law upon this subject is found in section 1442 of the Civil Code of the State of California, which provides:

> "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created."

Section 1069 of the Civil Code of the State of California is also pertinent and reads in part as follows:

"A grant is to be interpreted in favor of the grantee. . . ."

The rule of the cases in this matter is clear and may be summed up in the statement that "the law abhors forfeiture." The following are typical statements of the courts' approach to the problem:

> "Forfeitures are not favored in law and conditions providing for the forfeitures of an estate are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture."
> *Michaelian v. Elba Land Co.,* 76 Cal. App. 541, 554 (1926).

> "Conditions subsequent are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction."
> *Connor v. Lowery,* 94 Cal. App. 323, 326 (1928).

> "If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so."
> *Quatman v. McCray,* 128 Cal. 285, 289 (1900).

In 42 Cal. Jur. 2d, *Railroads* § 74, p. 62, the text statement is as follows:

> "Since forfeitures are not favored, a condition subsequent in a deed to a railroad corporation will be construed liberally in favor of the railroad and strictly against forfeiture."

Since the law abhors forfeiture, and since the law does not favor forfeiture, a forfeiture will be enforced only where no other interpretation is reasonably possible.

Lowe v. Ruhlman, 67 Cal. App. 2d 828, 832, 155 P.2d 671, 673 (1945);

McPherson v. Empire Gas & Fuel Co., 122 Cal. App. 466, 473, 10 P.2d 146, 148 (1932);

Milovich v. City of Los Angeles, 42 Cal. App. 2d 364, 373-74, 108 P.2d 960, 965 (1941).

In fact, if the agreement can be reasonably interpreted so as to avoid forfeiture, it is the court's duty to do so.

Quatman v. McCray, 128 Cal. 285, 289, 60 Pac. 855, 856 (1900);

Ser-Bye Corp. v. C. P. & G. Markets, 78 Cal. App. 2d 915, 919, 179 P.2d 342, 345 (1947);

McNeece v. Wood, 204 Cal. 280, 283-84, 267 Pac. 877 (1928).

Where there are two possible constructions, one of which leads to a forfeiture and the other avoids it, the courts' policy and rule of law are well settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible.

Ballard v. MacCallum, 15 Cal. 2d 439, 441, 101 P.2d 692, 695 (1940);

Brant v. Bigler, 92 Cal. App. 2d 730, 208 P.2d 47, 49 (1949);

Smith v. Baker, 95 Cal. App. 2d 877, 883, 214 P.2d 94, 99 (1950).

To restate the matter, contracts and deeds are to be so construed as not to cause a forfeiture if at all possible.

Victoria Hospital Ass'n v. All Persons, 169 Cal. 455, 459, 147 Pac. 124, 126 (1915).

IV. The Findings of the Trial Court Shall Not Be Set Aside Unless Clearly Erroneous.

Rule 52 (a) of the Federal Rules of Civil Procedure prescribes that the trial court's findings of facts in actions tried without a jury, as in this case, shall not be set aside unless

clearly erroneous. *United States v. Gypsum,* 333 U.S. 364 (1948). Under the "clearly erroneous" rule, an appellate court cannot upset the trial court's factual findings unless it is left with the definite and firm conviction that mistake has been committed. *Guzman v. Pichirilo,* 369 U.S. 698 (1962).

Appellee has identified, by appropriate reference to exhibits and the reporter's transcript, the evidence introduced in this matter, which is sufficient to support the trial court's findings. In addition, appellee has referred to the applicable principles of law and equity which show the trial court's conclusions of laws based on its findings are correct.

CONCLUSION

The evidence and the applicable principles of law and equity clearly establish the property in question has not ceased to be occupied for railroad purposes and there has not been a breach of the provisions of the August 6, 1890 deed. Since appellants and their predecessors conveyed to others the land adjacent to the property in question, it is clear under applicable legal and equitable principles appellants are no longer entitled to enforce whatever rights they may have had under the provisions of the August 6, 1890 deed.

It is therefore submitted the judgment of the trial court should be affirmed.

Dated at San Francisco, California, this 27th day of September, 1963.

Randolph Karr
Roy Jerome

By Randolph Karr
Attorneys for Appellee
Southern Pacific Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RANDOLPH KARR
Attorney for Appellee.

No. 18538

United States Court of Appeals For the Ninth Circuit

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL NO. 6 OF THE UNITED STEELWORKERS OF AMERICA, AFL-CIO, *Appellants,*

v.

NORTHWEST STEEL ROLLING MILLS, INC., a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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Appendices:

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United States Court of Appeals
For the Ninth Circuit

United Steelworkers of America, AFL-CIO, and Local No. 6 of the United Steelworkers of America, AFL-CIO,
Appellants,

v.

Northwest Steel Rolling Mills, Inc., a corporation,
Appellee.

No. 18538

Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Amended and Additional Facts

Appellants' Statement of the Case requires amplification with respect to certain facts and the additional facts and corrections hereinafter noted.

Appellants commence their "Statement of the Case" by erroneously asserting that the summary judgment entered herein was one "denying an action for enforcement of an arbitration award." The judgment actually affirms the arbitration award in respect to those matters as to which the District Court found the arbitrator had jurisdiction. The award was held invalid and unenforceable only with respect to those matters found to be outside the jurisdiction of the arbitrator (R. 90).

In February of 1962, appellants commenced an action in the Superior Court of the State of Washington for King County, under Cause No. 579234 (R. 4). This action was disposed of by execution by appellants and appellee and their attorneys of the stipulation dated February 16, 1962, hereinafter called "February 16 stipulation" (R. 29, 81), which was filed in said action.

Pursuant to the terms of the February 16 stipulation and in line with the settled practice of the appellants and appellee in former arbitration cases, the stipulation dated March 13, 1962, hereinafter called "March 13 stipulation," was executed on behalf of appellants and appellee by their attorneys (R. 9-10, 12-13, 81). This stipulation was transmitted to appellants' attorney by letter reading as follows:

> "The stipulation between us calls for separate stipulations as to each arbitration. I enclose for your attention suggested draft of stipulation with respect to the arbitration before Professor Ross which I believe follows generally the form heretofore agreed upon in matters I have had with Mr. Furman. Please call me after you have had a chance to check this form of stipulation." (R. 82-83.)

The arbitration was held on March 15, 1962. On July 18, 1962, the arbitrator returned to Seattle where he orally announced his decision that the selection of men for tryouts and for positions in the Blooming Mill and Finishing Mill was not in accordance with the labor contract between the parties and then asked the parties to attempt to negotiate an agreement as to the filling of the new positions, in order to terminate the entire controversy.

The arbitrator's decision reads in part as follows:

> "Subsequent to the hearing the Company and Union briefs were received and considered. On July 18, 1962, I held a conference with the representatives of the parties at Seattle. It was my purpose to encourage an agreed upon settlement of the dispute; but, although sustained efforts have been made to achieve this purpose, the parties have not been able to develop a mutually acceptable disposition of the issues." (R. 13, 80-81).

The statement at page 4 in the appellant's brief that "Doctor Ross stated that he could either proceed to formulate an award—granting jobs, indemnification, setting up testing procedures, etc.—, or he could allow the parties to first suggest an agreed formula for filling the jobs" is not supported by the record.

These negotiations failed. The arbitrator was so informed and that it was therefore necessary for him to proceed to decide the matter freed from any of the previous negotiations (R. 13, 81).

In addition to the foregoing, it is important to emphasize that the arbitrator had no legal or factual basis upon which to proceed in allocating jobs and retirement benefits after having decided the limited issues submitted to him by the March 13 stipulation. That the allocation of jobs (a function of management as hereinafter shown) was not before him is demonstrated by several facts. In the first place, not all of the men attended the hearing before the arbitrator (R. 82), and no evidence was offered by the grievants to sustain any claim of "superior ability,"

although in each instance a number of men were involved with respect to each job (R. 82).

The award even went outside certain of the questions to be arbitrated, i.e., whether certain grievants were entitled simply to "try out" for jobs (as distinguished from an outright award of the jobs, or other benefit, as was awarded by the arbitrator) (R. 14-16, 40, 41).

Another and vital fact is that the parties themselves had reserved for later consideration the grievances of a large group of men who were seeking positions in the Finishing Mill (R. 84, 86). The arbitrator was informed of this reservation (R. 84), but nevertheless proceeded to fill certain of these Finishing Mill positions, thus rendering abortive the reserved grievances. In other words, the parties recognized that if the arbitrator found that appellee had in some way proceeded improperly in the selection of the men who were selected, then any subsequent selection process would have to take into consideration the pending grievances of others listed on the April 24, 1962, reservation of arbitration agreement (R. 86).

The awards by the arbitrator were not even made in accordance with the claims of the Union that the men were entitled to placement in accordance with seniority (R. 85). For instance, the issue raised as to Garrioch and Ward was whether they were unjustly denied "tryouts" (as distinguished from outright awards of jobs) (R. 40, 41, 85). They had the highest seniority (of those filing grievances) in the former Rolling Mill Department. However, they were awarded the lowest-rated jobs in the

revised Finishing Mill Division. In addition to answering question No. 2 of the stipulation, the arbitrator awarded the job of Blooming Mill Operator to Flynn, who was junior in seniority to both Issacson and DeLong. The problem is emphasized by the fact that, subsequent to the arbitrator's decision, DeLong filed a grievance protesting the allocation to Flynn of the job of Blooming Mill Operator when Flynn was junior to him (DeLong) in seniority (R. 85).

That the selection of men for positions in the new mill was a right reserved to the appellee is shown by paragraph 2 of the letter of July 7, 1960 (R. 8, p. 42), and Section 1 of Article IX of the labor contract (R. 8, p. 23). Under this article, an important criteria of selection is "(b) ability to perform the work", a determination reserved to appellee under Article 3 of the labor contract, hereinafter quoted at page 13 (R. 8, p. 10).

The District Court found that the questions submitted to the arbitrator were to be answered either in the affirmative or negative. The judgment of the District Court was that the arbitrator had no power or authority to do anything under the stipulation of the parties except to give such affirmative or negative answers to the five questions posed in the March 13 stipulation (R. 20). The reason for this limitation is, of course, that the parties, by their stipulations, had not taken away from the employer its reserved right to make the ultimate job selections, and this intent is further shown by the limited record and proof submitted to the arbitrator which furnished him no basis for making such ultimate job selec-

tions and other beneficial awards (R. 82).

LAW POINTS AND ARGUMENT IN SUPPORT OF JUDGMENT

Summary of Argument

The District Court's Memorandum Decision is an excellent and concise statement of this case and is set forth in full as Appendix A to this brief.

It is appellee's position that summary judgment for it was properly granted. Appellee's argument is presented under the following headings:

I. The District Court Was Correct in Granting Appellee's Motion for Summary Judgment.

A. The Arbitrator's Authority Was Limited to the Authority Conferred Upon Him by the March 13 Stipulation

1. *The Terms of the March 13 Stipulation Are Plain and Unambiguous*

2. *The Labor Contract Does Not Require the Submission of Unsettled Grievances to the Arbitrator*

3. *The Arbitrator's Decision Was Not in Line With the Terms of the Labor Contract*

4. *The District Court Did Not Violate Federal Policy*

B. No Material Issues of Fact Existed

1. *No Material Issue of Fact Was Created or Raised by the Labor Contract, Grievances, Stipulations or Contemporaneous Documents and Statements of the Parties*

2. *No Material Issue of Fact Existed as to Whether*

Appellee Had Waived the Limitations Which Were Placed Upon the Arbitrator's Authority.

ARGUMENT

I. The District Court Was Correct in Granting Appellee's Motion for Summary Judgment

It is the position of the appellee that under the March 13 stipulation the arbitrator had no jurisdiction or power or authority whatsoever to make any decision except to give an affirmative or negative answer to the questions posed, thus remitting the matter of reselections of personnel for the new jobs back to the company under its management functions provided for under Article III of the labor contract between parties and that, therefore, summary judgment for appellee was properly granted.

The arbitrator did specifically answer the questions submitted by the March 13 stipulation by stating in his decision as follows:

> "It therefore follows that the company's actions did violate the basic agreement . . ." (R. 14.)

Everything thereafter decided or purportedly determined or awarded by the arbitrator in said decision was outside his power and jurisdiction (except the one sentence in which he found that the grievances of Stockman and Perfrement were timely filed, these questions having been posed under Paragraph 5 of the March 13 stipulation).

A. The Arbitrator's Authority Was Limited to the Authority Conferred Upon Him by the March 13 Stipulation

1. *The Terms of the March 13 Stipulation Are Plain and Unambiguous*

The March 13 stipulation speaks for itself and clearly restricts the arbitrator to an answer to the questions submitted. The February 16 stipulation states that the separate matters will be submitted, not on the grievances but on separate stipulations, as follows:

> "I. It is agreed that the separate matters involved in paragraphs 1(a), (b) and (c) and 6(a) of said letter shall be submitted to Mr. Arthur Ross for arbitration by him.
>
> "IV. Separate arbitration stipulations shall be submitted to each of the above named arbitrators listing the issues to be considered and determined by them as set forth above." (R. 29.)

The March 13 stipulation was clearly called for by the February 16 stipulation disposing of the King County Cause No. 579234 litigation and the March 13 stipulation as executed was not some ineffectual document as appellants would attempt to make it. It had been the settled practice of the parties in cases under the labor contract here involved to draw arbitration stipulation agreements specifically agreeing upon the issues to be determined by the arbitrator. The March 13 stipulation was drawn and executed therefore because it was both required by the February 16 stipulation and by the settled practice of the parties of defining the specific issues raised by the grievances so that there would be no misunderstanding as to the issues raised or the point or points to be determined (R. 29, 81-82). This is evidenced by the letter of transmittal for the draft of the March 13 stipulation to

appellant's counsel, reading as follows:

> "*The stipulation between us calls for separate stipulations as to each arbitration.* I enclose for your attention suggested draft of stipulation with respect to the arbitration before Professor Ross which I believe *follows generally the form heretofore agreed upon in matters I have had with Mr. Furman.* Please call me after you have had a chance to check this form of stipulation." (R. 82-83.) (Emphasis supplied.)

The following cases are cited in support of appellee's position that the arbitrator's award could not extend beyond the limits of the authority conferred upon him under the terms of the March 13 stipulation:

In *Smith and Wesson, Inc.*, 10 War Labor Reports 148 at page 151 and following the Board in voiding a portion of an arbitration award stated the applicable rules as follows:

> "There are certain well established principles of law and equity which are available to guide the Board by way of analogy in determining the fundamental issues which are presented with respect to this arbitration.
>
> "1. The authority of the arbitrator must be determined from the terms of the submission and 'as in the case of other written instruments each part of the submission must have such effect as is ordinarily accorded the terms used in them. . . .'
>
> "2. The arbitrator's award cannot extend beyond the limits of the authority conferred upon him under the terms of the submission.
>
> "3. The extent of the authority of the arbitrator under the submission is for the court and not for the arbitrator to determine.

"4. If the award of the arbitrator departs from the terms of the submission that portion of the award which constitutes a departure is void.

"5. If a portion of the arbitrator's award departs from the terms of the submission, the award may be sustained as to that portion which is within the frame of reference, if the award is severable and the otherwise valid portion is not affected by the departure.

"6. Courts of law generally regard the invalidity of an arbitrator's award as a bar to an action upon such an award. If the case is one of equity jurisdiction, a court of equity has the power to set aside an invalid award."

In *Textile Workers Union of America v. American Thread Co.*, 291 F.(2d) 894 (4th Cir. 1961), the arbitrator determined that the employee was discharged for cause and ordered reinstatement. The company on challenge to the award contended that the arbitrator's only function was to determine whether good cause for disciplinary action existed and that the determination of the appropriate action to be taken was for management. The Court of Appeals refused to enforce the award and in agreeing with the Company's contention stated (at page 900):

"Neither the contract nor the submission gave the arbitrator any right to disregard established disciplinary practices, consistently applied, and to dispense his own brand of industrial justice."

The court also stated (at page 898):

"It is impossible to overemphasize the terms and conditions of the submission which was the product of agreement between the parties and which was both the source and limit of the arbitrator's authority and power."

In *Local 453, International U. of E., R. & M. Workers v. Otis Elevator Co.*, 201 F. Supp. 213, 215 (D.N.Y. 1962), the court in holding that an arbitrator's award was void and unenforceable because in violation of public policy also stated:

> "As a general rule an arbitrator's decision is not open to judicial review, unless he has exceeded his power by deciding a matter not arbitrable under the contract *or the submission*" (emphasis supplied).

In *Consolidated Vultee Aircraft Corp. v. United Automobile, Aircraft & Agricultural Implement Workers of America, Local 904*, 160 P.(2d) 113 (1945) the court stated:

> "It was the duty of the court to determine from the agreement the extent of the referee's powers and to annul any or all of the provisions of the award as matters which had not been submitted to him for decision."

In *Application of MacMahon*, 63 N.Y.S.(2d) 657 (1946) the court granted a motion to vacate the award of an arbitrator because he had failed to answer all of the questions submitted. In deciding the case, however, the court made statements equally applicable to the issue here since the court emphasized that the arbitrator was limited and bound by the arbitration agreement. The court stated:

> "The submission to arbitration clothed the arbitrator with jurisdiction to hear and determine the specific issues which the parties, by their voluntary agreement, designated as the subjects to be determined by him. The submission is, at one and the same time, the source and definition of the authority to be exercised by the arbitrator."

2. *The Labor Contract Does Not Require the Submission of Unsettled Grievances to the Arbitrator*

Appellants' position that the contract *requires* the submission of unsettled grievances to the arbitrator is untenable. Article XI of the contract provides in part as follows:

> "Section 2. In the event that a grievance shall not have been satisfactorily settled by the Union and the Company, *the case in question* with all records pertaining thereto *can then be* appealed to an arbitrator to be appointed by mutual agreement of the parties hereto. The arbitrator shall render a decision in line with the written terms of the contract and said decision shall be final. * * *" (emphasis supplied) (R. 8, page 28).

The foregoing section which is relied upon by appellants does not in any way make it mandatory that the grievance must be the basis upon which appeal to arbitration is made. The labor contract is silent as to the procedure to be followed when a case in question is appealed to arbitration. Absent procedural direction in the labor contract, it had become the settled practice of the parties to draw arbitration stipulation agreements specifically agreeing upon the issues to be determined by the arbitrator (R. 81-82).

3. *The Arbitrator's Decision Was Not in Line With the Terms of the Labor Contract*

The decision of the arbitrator, even if he had the broad authority contended for by appellants, is not in line with the written terms of the labor contract between the parties. Article III of the labor contract provides as follows:

"Management Functions

"Section 1. The management of the plant and the direction of the working forces and the operations of the plant, including the hiring, promoting and retiring of employees, the suspending, discharging or otherwise disciplining of employees, the layoff and calling to work of employees in connection with any reduction or increase in the working forces, the scheduling of work and the control and regulation of the use of all equipment and other property of the Company, are the exclusive functions of the Management; provided, however, that in the exercise of such functions, the Management shall observe the provisions of this Agreement and shall not discriminate against any employee or applicant for employment because of his membership in or lawful activity on behalf of the Union." (R. 8, pages 10-11).

The designation by the arbitrator of certain employees to fill some of the new jobs was a usurpation of the rights reserved to management. Certainly no ultimate job selection was involved in the arbitration where some of the men did not even attend the hearing and no evidence was offered by the grievants to sustain any claim of superior ability, although in each instance a number of men were involved with respect to each position (R. 82). Thus, the arbitrator's decision went beyond even the broad authority claimed for him by the appellants. The arbitrator was by the terms of the labor contract required to remit the matter of reselections of personnel for tryouts and new jobs back to the appellee.

4. *The District Court Did Not Violate Federal Policy*

The District Court did not violate federal policy or substitute its contract interpretation for that of the ar-

bitrator as alleged by appellants at pages 19-23 of their brief.

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The principle has been enunciated many times. *Drake Bakeries, Inc., v. Local 50, etc.*, 370 U.S. 254, 256 (1962); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

Appellee agreed to arbitrate the separate matters identified in paragraphs 1(a), (b) and (c) and 6(a) of the letter attached to the February 16 stipulation by submitting an arbitration stipulation to the arbitrator listing the issues to be considered and determined by him. This appellee did when it executed the March 13 stipulation (R. 29).

The arbitrator interpreted the labor contract between the parties and based on the evidence presented at the arbitration hearing found that the appellee had violated its terms in selecting personnel for tryouts and new jobs. The arbitrator then went outside the terms of the labor contract and the February 16 and March 13 stipulations and decided that as a matter of law he had the authority to fashion an award (R. 14). Such authority was outside the scope of the March 13 stipulation and the District Court so found and entered judgment accordingly (R. 87-90).

B. No Material Issues of Fact Existed

Appellant contends that material issues of fact existed because:

(a) The labor contract, grievances and March 13 stipulation, read together, create an issue of fact.

(b) Contemporaneous documents and statements of the parties raise an issue of fact.

(c) An issue existed as to whether appellee had waived any right to restrict the arbitrator's authority.

1. *No Material Issue of Fact Was Created or Raised by the Labor Contract, Grievances, Stipulations or Contemporaneous Documents and Statements of the Parties*

As previously noted, the labor contract is silent as to the procedure to be followed when a case in question is appealed to arbitration, and it had become the settled practice of the parties to draw arbitration stipulation agreements specifically agreeing upon the issues to be determined by the arbitrator (R. 81-82).

Appellants omit from their argument, beginning at page 25 of their brief, any reference to the February 16 stipulation. The language of the February 16 and March 13 stipulations is clear and unambiguous. The intent of the employees in preparing their grievances long prior to the appeal to arbitration is not an issue. When cases in question are appealed to arbitration, the employees are represented by their union, appellants herein (R. 8, page 28).

The March 13 stipulation clearly restricts the arbitrator

to an answer to the questions submitted. On its face it is more than a general outline of the categories in which the several different grievances fell. This stipulation was drawn and executed because it was required both by the February 16 stipulation and by the settled practice of the parties (R. 29, 81-82).

The February 16 and March 13 stipulations speak for themselves and provide the answer to the question of what issues were to be considered and determined by the arbitrator and the authority given him by the parties. The intent of the parties is to be found in the language employed and not from gratuitous and self-serving statements. This rule is expressed in *Bellingham Securities Syndicate, Inc., v. Bellingham Coal Mines, Inc.*, 13 Wn. (2d) 370, 384, 125 P.(2d) 668:

> "It is only in those cases where the writing fails to provide the answer to a question of meaning that the courts may look elsewhere for aid in construction. Where the terms are plain and unambiguous, the meaning of the contract is to be deduced from its language (17 CJS 695)."

That the arbitrator's authority was limited to answering the specific questions asked is evidenced by, in addition to the February 16 and March 13 stipulations, the following facts:

(a) Appellants' brief to the arbitrator stated at page 3:

> "As a result of these grievances, it is agreed by the 'stipulation to arbitrate' that specific questions presented by them are submitted for arbitration as follows:" (R. 82.)

(b) Various phases of the arbitration hearing itself, such as failure of all of the grievants to appear and failure to submit evidence as to relative ability, although a number of men were involved with respect to the specific positions sought. Certainly no ultimate job selection was involved in view of such lack of attendance and evidence failure (R. 40, 41, 82).

(c) The draft for the March 13 stipulation was submitted to appellant's counsel by letter (quoted herein at page 9) showing that both the February 16 stipulation and established practice of the parties required such a stipulation (R. 82-83).

(d) The parties by their stipulations had not taken away from the employer its reserved right to make the ultimate job selections, and this intent is further shown by the limited record and proof submitted to the arbitrator which furnished him no basis for making such ultimate job selection and other beneficial awards (R. 82).

At page 29 of their brief, appellants contend that, if the parties did not intend for arbitrator Ross to select the proper men for the positions in the event he found a contract violation, there would be no purpose in waiting to see what positions had been filled by the arbitrator. This is patently a non-sequitur. The April 24, 1962, letter agreement is clearly a recognition that, if the arbitrator found that the company had in some way proceeded improperly in the selections involved in the questions submitted to him, then the entire selection process, including that relating to the men listed in the April 24 letter, would

have to be reconsidered by appellee in the light of the affirmative or negative answers given by arbitrator Ross to the questions submitted to him.

The gratuitous statements included in the appellants' brief at pages 27-28 are irrelevant as there could be no issue under the arbitration except the issues submitted by the March 13 stipulation itself. The statement by counsel for the appellee, cited at page 28 of appellants' brief, is consistent with the position of the appellee on its motion for summary judgment, as obviously the arbitration would lead either to an approval of the appellee's selections or the making of new ones by the appellee in accordance with the appellee's right to make such selections as guaranteed by the labor contract.

2. *No Material Issue of Fact Existed as to Whether Appellee Had Waived the Limitations Which Were Placed Upon the Arbitrator's Authority*

The rule is that waiver can be manifested only by actions inconsistent with any other intention than to waive. This rule is expressed in *Caterpillar Tractor Co. v. Collins Machinery Co.*, 286 F.(2d) 446, 451 (9th Cir. 1960), where this court stated:

> "Waiver is an intentional and voluntary relinquishment of a known right. *O'Connor v. Tesdale*, 1949, 34 Wash.(2d) 259, 263, 209 P.(2d) 274, 276. It may be manifested by actions, but such actions must be inconsistent with any other intention than to waive. *Bowman v. Webster*, 1954, 44 Wn.(2d) 667, 669

> P.(2d) 960, 961. The mere fact that the other party is mistakenly led to believe there's been a waiver is not enough unless that party relies thereon to his detriment, in which case there's an estoppel. There is no evidence of any detrimental reliance by appellant, so the only question is whether appellee conducted himself in a manner inconsistent with any other intention than to waive."

Appellee did not conduct itself in a manner inconsistent with any other intention than to waive. Appellee refused to carry out the award in the particulars claimed to be outside the jurisdiction of the arbitrator as set forth in its motion for summary judgment, and therefore clearly gave notice that it did not believe that the award was a lawful, enforceable award. It was never necessary to take this position with the arbitrator as the parties had no notice of the portions of the award to which objection was made until the award was issued.

At the conference on July 18, 1962, the arbitrator stated that he found that the company had violated the agreement in the selection of men for the new jobs and then asked the parties to attempt to negotiate an agreement as to the filling of the new positions, in order to terminate the entire controversy. The parties did attempt such negotiation but were not able to reach an agreement. This is evidenced by the award itself in which the arbitrator stated:

> "It was my purpose to encourage *an agreed upon settlement of the dispute;* * * * *. (R-13) (emphasis supplied)

These negotiations having failed, the arbitrator was informed of this and that it was therefore necessary that

he proceed to decide the matter freed from any of the previous negotiations. The negotiations for an agreed placement of men having failed, and the decision being issued without further contact with the arbitrator, there was no notice that the arbitrator was going to do other than answer the questions submitted to him (R. 81).

With respect to the negotiations for an overall disposition of the entire matter, another phase of the matter must be clearly understood. The grievances attached to the March 13 stipulation did not cover all of the grievances filed with respect to the selection by appellee of employees for new positions in the Blooming and Finishing Mills. The letter agreement of April 24, 1962, held in abeyance the grievances regarding selection of employees for new positions in the Finishing Mill. One reason why the arbitrator's decision could not take the form which it did is that the claims of the men listed in this letter agreement also had to be later considered. Although the arbitrator was informed prior to his decision of the existence of this agreement and a copy furnished to him, it was felt that since his award placed men in the Finishing Mill, in the very positions which the parties had agreed would be separately considered, that he must have overlooked this matter and therefore the motion for reconsideration on this point was filed. It was felt that this motion was certainly well taken in view of this letter agreement and that favorable action on it would narrow the issue which would have to be submitted when the award was called in question as it was by appellee's motion for summary judgment. Appellee's counsel informed

the arbitrator that on second thought it had been the company's purpose to widen its motion as stated in appellee's motion for summary judgment herein so that he would have an opportunity to review his claim of jurisdiction but that, since the matter was taken into court before the company had an opportunity to do this, such a revised motion did not seem to be in order (R. 84-85).

Assuming for purposes of argument that appellants were mistakenly led to believe that there had been a waiver, there is in this case no evidence of detrimental reliance. The arbitrator orally announced that the appellee company had violated the contract in the selection of men for the new jobs (R. 80). He then sought "to encourage an agreed upon settlement of the dispute" (R. 13). The language that the parties agreed to assist the arbitrator "in formulating the award" is that of the appellant and not the arbitrator (Appellant's Brief, page 31). Appellee can not be estopped to assert its rights because it entered into negotiations to reach an agreed upon settlement of the dispute between the parties.

CONCLUSIONS

The conclusions to be drawn from the foregoing is that:

(a) The March 13 stipulation limited the authority of the arbitrator to answering the specific questions asked;

(b) No material issue of fact was created or raised by the labor contract, grievances, stipulations or contemporaneous documents and statements of the parties; and

(c) No material issue of fact existed as to whether ap-

pellee waived the limitations which were placed upon the arbitrator's authority.

Therefore, the District Court's entry of summary judgment for appellee should be affirmed.

Respectfully submitted,

DeWitt Williams
Robert H. Lorentzen
Attorneys for Appellee

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June, 1963

APPENDIX A

United States District Court
Western District of Washington
Northern Division

United Steelworkers of America, AFL-CIO, and Local No. 6 of the United Steelworkers of America, AFL-CIO, *Plaintiffs,* v. Northwest Steel Rolling Mills, Inc., a corporation, *Defendant.*	No. 5712 **Memorandum Decision**

In this case plaintiff seeks to establish the validity of an arbitrator's award and to enforce the same. Defendant moves the Court to enter summary judgment adjudging that certain portions of the award are invalid and unenforcible because they exceed the authority conferred upon the arbitrator by the terms of the submission.

Plaintiff predicates relief solely upon Section 2, Article XI, of the basic labor agreement between the parties which provides in the event that a grievance shall not have been satisfactorily settled by the union and the company, the case in question with all records pertaining thereto can then be appealed to an arbitrator to be appointed by mutual agreement who shall render a decision in line with the written terms of the labor agreement and said decision shall be final.

The parties did not submit the grievances to arbitration pursuant to the specific terms of the aforesaid provision of their labor agreement but prepared and signed a written

stipulation to arbitrate dated March 13, 1962. The stipulation was executed on behalf of each party by its attorney, and the authority of the attorneys to so stipulate on behalf of the parties has not been challenged and is not in issue.

The stipulation recites—

> "The matters submitted for arbitration involve the 'Grievances,' copies of which are attached hereto." (Underscoring supplied.)

It then recites the name of the arbitrator, following which it provides "The questions submitted for arbitration are as follows," and thereafter lists five specific questions.

The manner of submission adopted by the parties was in accordance with a stipulation executed by them on February 16, 1962, in connection with the dismissal of an action then pending between them in the Superior Court of the State of Washington for King County, which provided that separate arbitration stipulations shall be submitted to each of several named arbitrators listing the issues to be considered and determined by them. Assuming arguendo, however, that the plaintiff was at liberty to have submitted the grievances involved directly to the arbitrator, it chose to follow a different course.

The first paragraph of the stipulation to arbitrate does not recite that the matters submitted for arbitration *are* the "Grievances," copies of which are attached hereto, but uses the word "involve." The stipulation is free from ambiguity and means simply that the five specific questions submitted for arbitration arise out of the "Grievances" attached.

Counsel for plaintiff has made it clear that he relies on the aforesaid provision of the labor agreement and that there are no other agreements or understandings between the parties oral or in writing, other than the stipulation to arbitrate under discussion.

It appearing to the Court that the stipulation to arbitrate was the free and voluntary act of the parties, that it is clear and unambiguous and that it specifically sets forth the questions submitted for arbitration, it is valid and binding upon the parties.

The arbitrator was conscious of the authority conferred upon him by the stipulation for he recites in his award the questions submitted for arbitration in the identical language appearing in the stipulation. In his award, however, he goes beyond the authority conferred upon him in the stipulation for the reason, as stated by him, that it is well established at law that an arbitrator has authority to fashion an award which will fairly and equitably remedy the violations which have occurred.

It is the opinion of the Court that the arbitrator had no power or authority to do anything except to give an affirmative or negative answer to the questions posed. The award does find that the company's actions violated the basic agreement and that the grievances of Earl Stockman and Jack Perfrement are timely. The Court construes these findings to be an affirmative answer to questions 1 to 4, inclusive, and an affirmative answer to question 5, set forth in the stipulation to arbitrate. Any finding or award of the arbitrator in addition thereto was in

excess of the authority extended to him and hence invalid and unenforcible. Accordingly, defendant's motion for summary judgment is granted.

Defendant may prepare an order based upon this memorandum for presentation to the Court at 9:30 A.M., December 10, 1962.

DATED this 29th day of November, 1962.

W. T. BEEKS,
United States District Judge

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

.....

ROBERT N. LORENTZEN,
An Attorney for Appellee.

No. 18538

United States Court of Appeals
For the Ninth Circuit

United Steelworkers of America, AFL-CIO, and Local No. 6 of the United Steelworkers of America, AFL-CIO, *Appellants,*

vs.

Northwest Steel Rolling Mills, Inc., a corporation, *Appellee.*

Appeal from the United States District Court for the Western District of Washington, Northern Division

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

SUMMARY OF REPLY ARGUMENT

In this brief, appellants reply to new contentions made in appellee's brief, replying to Section A of said brief under the heading:

I. Management's Functions Were Not Usurped by the Arbitrator;

and replying to Section B of said brief under the heading:

II. The Court Was Not Prohibited from Interpreting the Stipulation to Arbitrate in Accordance with the Contract and Contemporaneous Documents and Statements.

REPLY ARGUMENT

I.

Management's Functions Were Not Usurped by the Arbitrator.

The argument that the arbitrator's award herein violated management's reserved prerogatives under the contract, which is set forth on pages 12 and 13 of appellee's brief, results from a strained interpretation of the clause entitled "Management's Functions" and a complete disregard of the other sections of the contract.

Truly, the company has the right to direct operations and make job selections, "provided, however, that in the exercise of such functions, the Management shall observe the provisions of this Agreement" (R. 8, page 10). The primary provisions of the agreement limiting the company's rights herein were Article IX, Section 1, on "Seniority" (R. 8, page 23); Article XI on Grievances and Arbitration (R. 8, pages 27 and 28); and the Letter of Agreement executed contemporaneously with the new contract (R. 8, pages 41 and 42). In the July 7, 1960, Letter of Agreement, the parties specifically agreed that, in filling the new jobs, present eligible employees "shall be given preference, subject to Section 1 of Article IX of the Basic Agreement, in filling such job openings . . . " (R. 8, page 42). As a result of the aforesaid contract provisions, management's rights in filling the contested jobs were severely restricted; and the arbitrator was free to interpret the intent of the parties and formulate an equitable award, after the company had been given the right of filling the jobs in accordance with the contract and had failed.

In *United Steelworkers v. Warrior & Gulf Navigation Company,* 363 U.S. 574 (1960), the Supreme Court has commented at length on management's so-called prerogatives in the face of collective bargaining agreements containing absolute no strike clauses. The following pertinent comments were included in that discussion:

> "Collective bargaining agreements regulate or restrict the exercise of management functions . . . When . . . an absolute no strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes . . .
>
> " 'Strictly a function of management' might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge. But if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the exception. Every grievance in a sense involves a claim that management has violated some provision of the agreement." (pages 583 and 584.)

If, after the company had made selections to fill the new jobs and had done so in violation of the agreement, the arbitrator could do no more than say the company had violated the contract, the patently unreasonable and prohibitively expensive situation would exist of the company being able to reselect the same man, or another equally in violation of the contract. The union on behalf of the senior employees would then have to go to arbitration after arbitration, ad infinitum, without

ever securing the jobs for those entitled to them; and with no result other than a series of decisions that the company had violated the contract.

Carrying the company's argument to its logical conclusion, the company demands unrestricted right to promote, retire, suspend, fire or lay off. An arbitrator could not reverse any such decision by requiring promotion, retirement or reinstatement, because the company had violated the contract. The company argues that in any of these situations, because of management's prerogatives, all an arbitrator can do is say the company is wrong, and that the company is then free to redeliberate and repeat the violation or make new decisions in violation of the contract.

Both the agreement between the parties and a common sense approach to industrial peace negate the company's claim that it has a continuing unrestricted right to make job selections, even after violating the agreement in making those selections.

Most of the other contentions raised by appellee in Section A of its argument have been fully considered in appellant's brief.

None of the cases cited by appellee were decided on the basis that the arbitrator had exceeded his authority under the submission agreement. Most of the cases, including *Smith and Wesson, Inc.,* 10 War Labor Reports 148, *The Textile Workers Case,* 291 F.2d 894 (4th Cir.—1961); and *The Consolidated Vultee Case,* 160 P. 2d 113 (Calif.—1945), are decided on findings that the arbitrator had violated *contractual restrictions* of his power to act; while the *Otis Elevator Case,* 201 F.Supp.

213 (D.C.N.Y.—1962) and *Application of MacMahon,* 63 N.Y.S.(2d) 657 (1946) were decided on public policy and the New York arbitration law, respectively.

These cases do not support the appellee's allegation that the submission agreement, regardless of contract language, is the sole source of the arbitrator's power. The contract's language was all important in each case. The contract involved in each of the first three above-cited cases had an express limitation of the arbitrator's authority under the arbitration clause. In *The Consolidated Vultee Case,* 160 P.(2d) 113 (Calif.—1945), the contract contained the following limitation of the arbitrator's power:

> "The permanent referee shall not have the jurisdiction to arbitrate provisions of a new agreement or to arbitrate away, in whole or in part, any provisions of this agreement." (page 116)

Discussing this clause and those similar to it in other cases, the court said:

> "It seems clear that the special clause limiting the powers of the referee was inserted for the specific purpose of qualifying the general provisions for arbitration and it is therefore controlling. Sec. 1859 Code of Civ. Prac.; Smith & Wesson, Inc., 10 War Labor Reports, 148, 151 . . . "

The contract involved in the case before this court (R. 8) contains no similar limitation of the arbitrator's authority.

II.

The Court Was Not Prohibited from Interpreting the Stipulation to Arbitrate in Accordance with the Contract and Contemporaneous Documents and Statements.

In Section B of its brief appellee, in effect, attempts to apply the parol evidence rule to prohibit a consideration of the collective bargaining agreement or the contemporaneous documents and statements of the parties, in interpreting the intent of the parties in the March 13 stipulation. In the case of *Pacific Northwest Bell Telephone Co. v. Communications Workers of America,* 310 F.(2d) 244 (9th Cir.—1962), this Court had occasion to consider a similar claim, although there the claim was that the court could not go beyond the language of the collective bargaining agreement and consider the bargaining history in attempting to determine the intent of the parties. The following language from that opinion is pertinent:

> "The first question related to the parol evidence rule. Appellee asserts (and apparently the district court agreed) that evidence of bargaining history in this case would serve to change, vary and contradict the terms of the agreement, and that all prior understandings must be merged into the expressions of the written contract.
>
> "We cannot agree. It simply cannot be said that as to the arbitrability of disciplinary suspension the contract's meaning is plain when the fact is that the contract is silent. As has been frequently pointed out, agreements of this sort are far different in nature and purpose from the ordinary commercial agreement. They are in effect a compact of self-government. As pointed out in United Steel-

workers of America, v. Warrior & Gulf Navigation Co., 1960, 363 U.S. 574, 580-581 . . . :

"'Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown even to the negotiators.'

"Mr. Justice Brennan, concurring in American and Warrior, supra, at page 570 . . ., states:

"'Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion. The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy.'

"We conclude that the parol evidence rule does not apply here to preclude examination of the bargaining history upon the question of the arbitrability of this dispute" (Page 247).

In Section B of appellee's brief, arguing that no material issues of fact existed, the appellee has relied heavily and repeatedly on the reply affidavit served and filed by counsel for the appellee company on the morning of the hearing of the motion for summary judgment (R. 80-85). Repeatedly, appellee attempts to strengthen its case by citing the allegations of this affidavit to show that the parties had a settled practice of

replacing the grievances and the contract by arbitration stipulation agreements and that the arbitration hearing gave the arbitrator no facts upon which to base a positive award (Appellee's brief, pages 2, 3, 13, 15, 16 and 17).

For the purposes of the summary judgment hearing, the statements in the reply affidavit had to be considered denied and could not be the basis for summary judgment. Judgment could not be entered against the appellants based on new allegations which they had no opportunity to refute. The evidence was required to be viewed in the light most favorable to appellants and appellants' allegations regarded as true. *United States v. Diebold,* 369 U.S. 654 (1962), *Guinn Company v. Mazza,* 296 F.(2d) 441 (D.C. Cir.—1961).

CONCLUSION

Having replied to the new contentions in appellee's brief, appellants urge that the prayer of their original brief be granted.

Respectfully submitted,

KANE & SPELLMAN,
Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

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Attorney

No. 18538

United States Court of Appeals
For the Ninth Circuit

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and LOCAL No. 6 of the United Steelworkers of America, AFL-CIO, *Appellants,*

vs.

NORTHWEST STEEL ROLLING MILLS, INC., a corporation, *Appellee.*

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APPELLANTS' BRIEF

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Appeal from the United States District Court for the Western District of Washington, Northern Division

APPELLANTS' BRIEF

JURISDICTION

This action was commenced by a Complaint seeking declaratory judgment enforcing an arbitrator's award under 28 U.S.C. 2201, it being alleged that there was an actual controversy existing between the parties; and that the jurisdiction of the District Court was based on 29 U.S.C. 185, commonly referred to as Section 301 of the Labor-Management Relations Act, the instant action being a suit for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in said law (R. 2).

Appellee moved for summary judgment (R. 17); the motion was heard on the pleadings and affidavits submitted (R. 2, 17, 18, 22, 36, 39, 80), and the District

Court granted summary judgment for the appellee (R. 90). Thereafter appellants filed timely notice of appeal (R. 99).

The jurisdiction of this Court is based upon 28 U.S.C. 1291 which vests jurisdiction of all appeals from final decisions of District Courts in the Courts of Appeal.

STATEMENT OF THE CASE

This is an appeal from a summary judgment denying an action for enforcement of an arbitration award.

The appellants are Unions representing, among others, some fifteen employees of the appellee company who filed grievances alleging that the Company violated its collective bargaining agreements by not assigning jobs in the reconverted mill to the grievants according to seniority (R. 42-79).

At the time of negotiation of the 1960-1962 agreement between the parties, the appellee company was in the process of beginning the installation of a new blooming mill and the reconversion of the finishing mill—converting to an automated plant. This would result in the elimination of several existing jobs. In a letter of agreement executed contemporaneously with the new contract (R. 8, pages 41 and 42), it was agreed that employees of the old mill would be given preference in manning the new mill, subject to Article IX of the basic agreement, which provides that where ability and physical fitness are relatively equal, seniority shall govern in all cases of promotion, increase or decrease of forces (R. 8, page 23).

When the new mill was manned, the grievances in-

volved herein were filed alleging that the company had violated Article IX of the agreement by not awarding to the grievants jobs to which they were entitled.

Article XI, Section 2, of the contract between the parties provides:

> "In the event that a grievance shall not have been satisfactorily settled by the Union and the Company, the case in question with all records pertaining thereto can then be appealed to an arbitrator to be appointed by mutual agreement of the parties hereto. The arbitrator shall render a decision in line with the written terms of the contract and said decision shall be final. . . ." (R. 8, page 28)

Said Article also contains, in Section 6, a "no strike" clause (R. 8, p. 28).

When the grievances were not satisfactorily settled, the grievants appealed them to arbitration and the parties agreed on Dr. Arthur Ross of the University of California as the arbitrator. Dr. Ross, on the day of his selection, agreed to serve only after being assured that the arbitration involved important problems of seniority in the face of automation (R. 26).

Two days prior to the arbitration hearing, counsel for the appellee company prepared a Stipulation to Arbitrate, which recited that the arbitration involved grievances, copies of which were attached to the stipulation, and which outlined five substantive questions under each of which some of the various grievances were categorized (R. 9, 10). The stipulation, with the grievances attached, was given to the arbitrator and read into the record by him at the beginning of the hearing. Also submitted at the beginning of the hearing was

the "Memorandum of United Steelworkers" which concluded: "It is for these reasons that the grievants seek an award requiring that they be placed in the new jobs in accordance with the agreements between the parties and that they be awarded back pay with interest." The appellant unions' opening statement concluded: ". . . we will ask that the men be given the jobs they are entitled to under the contract, and that they be awarded whatever damages are appropriate" (R. 28).

The arbitration hearing lasted, with recesses, from 9:00 A.M., until almost 9:00 P.M. Fifteen witnesses testified, twelve exhibits were received, and the arbitrator viewed the steel mill, reviewing the various operations involved in the disputed jobs. A 268-page transcript of the hearing was prepared by a court reporter (R. 4, 95, 96). Two months after the hearing, the arbitrator returned to Seattle where he orally announced his decision that the appellee company had violated the contract in all particulars. Dr. Ross stated that he could either proceed to formulate an award—granting jobs, indemnification, setting up testing procedures, etc.—, or he could allow the parties to first suggest an agreed formula for filling the jobs. The parties agreed to attempt to assist the arbitrator in formulating an award, negotiated with each other for two months, communicating with the arbitrator as to their progress, but were unable to reach an agreement and finally requested the arbitrator to formulate his own award (R. 13, 26, 80, 81).

On September 26, 1962, Dr. Ross handed down his decision and award in which he reiterated his oral pro-

nouncement that the appellee company had violated the contract in filling the jobs involved in the grievances, and in which he placed some of the grievants on the disputed jobs for try-out, retaining jurisdiction in the event that the men proved unsatisfactory (R. 11-16). Other grievants were given nothing under the award, the jobs they sought being filled with other grievants or employees having greater seniority, ability or fitness. Two grievants were directed to be pensioned, Rhodes having reached compulsory retirement and pension age before the award was announced, and Schillen who would reach such age within six months. Both of these men have been pensioned by the appellee company and this portion of the arbitrator's award is now moot. In addition to the foregoing Dr. Ross directed payment of lost wages to four grievants.

The appellee company filed a Motion for Reconsideration and Revision of Decision, asking the arbitrator to change certain specific portions of his award which appellee contended were job assignments in the finishing mill, while they should have been only try-outs for the jobs (R. 33-35). Appellee did not question nor seek changes in the other portions of the arbitrator's award which dealt with the blooming mill (R. 26, 27).

Subsequently the appellee company refused to carry out the terms of the arbitration award and, on October 26, 1962, appellants filed this action for enforcement of the award (R. 2-16). Appellee moved for summary judgment stating that the arbitrator had exceeded his authority by doing more than answering affirmatively or negatively the five questions in the Stipulation to Arbitrate (R. 17-21). Appellants moved to amend the

complaint by attaching the individual grievances to the Stipulation to Arbitrate (R. 39-79). The motion was granted.

The motion for summary judgment was heard on the pleadings and the affidavits of counsel. The Affidavit of John D. Spellman in Opposition to Defendant's Motion for Summary Judgment (R. 22-35) stated that at no time prior to filing its motion for summary judgment did the appellee company argue, plead or intimate that the arbitrator's authority was limited to merely answering five questions "yes" or "no" and not to entering an award settling the grievances. It further stated that the parties did not intend to so limit the arbitration, but, on the contrary, the parties intended that the arbitrator would arbitrate the grievances as provided by Article XI, Section 2 of the contract (R. 23). The affidavit stated that the Stipulation to Arbitrate was intended to be a general outline of the categories in which the several different groups of grievances fell, and cited portions of the arbitration hearing transcript and pleadings which allegedly show that the parties at all times intended and authorized the arbitrator to award jobs and try-outs, if he found the appellee company had violated the contract in its job selections (R. 24-26) This affidavit contends that the Stipulation to Arbitrate was superfluous under the contract's arbitration procedure, and even had the appellee company initially intended to attempt to restrict the arbitrator to merely answering questions, it had waived its right to so insist (R. 23, 26, 27). The affidavit stated that the contract provides for arbitration of the grievances themselves, and that the arbitrator's award was

based upon the grievances themselves in line with the written terms of the contract, and therefore final (R. 27).

Counsel for appellee company filed a reply affidavit on the morning or the hearing on the motion for summary judgment (R. 80). This affidavit denied that the parties intended to have the arbitrator make an award based on the grievances, denied that appellee had waived the right to so insist, and denied that the Stipulation to Arbitrate was intended to be only an outline of the issues (R. 81, 82, 83).

After oral argument based on the pleadings and affidavits, the court issued its Memorandum Decision (R. 87-89) in which it stated that the parties did not submit the grievances to arbitration pursuant to the specific terms of Article XI, Section 2, of the basic labor agreement (R. 87), but instead entered into a stipulation which limited the arbitrator's powers solely to giving an affirmative or negative answer to the five questions posed therein (R. 88, 89). The court found that the arbtrator had found that the appellee company had violated the contract with regard to each question submitted to him, but that all portions of his award in addition to those findings were in excess of the arbitrator's authority and therefore invalid and unenforceable (R. 89).

The court entered an order granting the motion for summary judgment (R. 90) and subsequently denied appellants' motion for new trial (R. 91, 93, 98).

SPECIFICATION OF ERRORS

1. The District Court erred in granting a Summary Judgment for Appellee.

2. The District Court erred in finding that the arbitrator had no power or authority to do anything except give an affirmative or negative answer to the five questions posed in the Stipulation to Arbitrate, said finding appearing in the Order Granting Defendant's Motion for Summary Judgment and reading:

> "It is ORDERED, ADJUDGED and DECREED that the arbitrator had no power or authority to do anything except to give an affirmative or negative answer to the five questions posed in the Stipulation to Arbitrate set forth in full in this arbitrator's decision which is Exhibit C to the complaint herein...." (R. 90)

3. The District Court erred in making the following findings:

> "The decision of the arbitrator did give an affirmative answer to all five questions set forth in said stipulation. Any finding or award of the arbitrator in addition thereto was in excess of the authority extended to him and is invalid and unenforceable." (R. 90)

4. The District Court erred in not finding that there was a genuine issue concerning material facts.

5. The District Court erred as a matter of law in not finding that the arbitrator's award was within the scope of the arbitrator's power under the collective bargaining agreement, was in line with the written terms thereof, and final and enforceable.

6. The District Court erred in finding that the griev-

ances herein were not submitted to the arbitrator, said finding reading:

> "The parties did not submit the grievances to arbitration pursuant to the specific terms of the aforesaid provision of their labor agreement but prepared and signed a written stipulation to arbitrate dated March 13, 1962." (R. 87)

7. The District Court erred in not granting appellants' motion for new trial (R. 98).

8. The District Court should be directed to enter a judgment enforcing the arbitrator's award in its entirety.

SUMMARY OF ARGUMENT

This appeal is based upon two contentions: First, that the trial court erred as a matter of law in finding that the arbitrator's award was in excess of his authority, and Second, that the trial court erred in granting summary judgment since there existed genuine issues of material fact.

These basic contentions are discussed under the following headings:

I. The court erred as a matter of law in finding that the arbitrator's award exceeded the scope of his authority.

   A. The arbitrator's authority was based upon the collective bargaining agreement, not the stipulation to arbitrate.

      1. The contract requires the submission of unsettled grievances to the arbitrator.

      2. The stipulation to arbitrate was merely an outline of substantive issues involved in the arbitration.

B. The arbitrator's award, deciding the grievances in line with the written terms of the contract, is final.

C. The court, violating federal policy, substituted its contract interpretation for that of the arbitrator.

II. Assuming the lower court not to have erred as a matter of law in finding that the contract was superseded by the stipulation to arbitrate, issues of material fact existed preventing summary judgment.

A. An issue existed as to whether the parties intended the stipulation to arbitrate to limit the arbitrator's contractual authority.

1. The contract, grievances and stipulation, read together, create an issue of fact.

2. Contemporaneous documents and statements of the parties raise an issue of fact.

B. An issue existed as to whether appellee waived any right to restrict the arbitrator's authority.

ARGUMENT

Upon an appeal from an order granting summary judgment it is proper to consider whether there was a genuine issue of material fact and whether the substantive law was correctly applied, *Koepke v. Fontecchia,* 177 F.2d 125 (9th Cir.—1949); Moore's Federal Practice, 2d Edition, s. 56.27 (1), p. 2364.

Appellants will address themselves to the lower court's errors in substantive law first, contending that the court erred as a matter of law. If appellants' position is correct as a matter of law, there would be no point in trying this case and appellants could proceed to move for summary judgment.

I.

The Court Erred as a Matter of Law in Finding that the Arbitrator's Award Exceeded the Scope of His Authority

The trial court found that the arbitrator exceeded his authority by doing more than answering five questions affirmatively or negatively, and ruled that all portions of the arbitrator's award which did more than answer the five questions were invalid and unenforceable (R. 90). This decision was based solely on the court's finding that the arbitrator's authority was restricted to the questions presented in the Stipulation to Arbitrate (R. 87-89). Appellants contend: (A) that the arbitrator's authority was based upon the contract between the parties, not the stipulation; (B) that in deciding the grievances in line with the written terms of the contract, the award was final and binding; and (C) that the court violated Federal Policy in striking down the arbitrator's award.

A. The Arbitrator's Authority Was Based Upon the Collective Bargaining Agreement, Not the Stipulation to Arbitrate

The method of adjustment of grievances between the parties has long been established. Article XI of the 1960-1962 collective bargaining agreement between the parties (R. 8, pages 26-29), in the same language which had been in preceding contracts, spells out the sole method of settling grievances.

1. The Contract Requires the Submission of Unsettled Grievances to the Arbitrator

Article XI of the contract, after providing machinery for settlement of grievances at various levels, provides in Section 2, as follows:

> "*Section* 2. In the event that a *grievance* shall not have been satisfactorily settled by the Union and the Company, *the case in question with all records pertaining thereto can then be appealed to an arbitrator* to be appointed by mutual agreement of the parties hereto. *The arbitrator shall render a decision in line with the written terms of the contract* and said decision shall be final . . ." (R. 8, page 28, emphasis supplied)

It seems clear that the parties have agreed, as the result of negotiation, that, when arbitration is necessary, the grievance, itself, with all pertinent records is *appealed* to the arbitrator. The use of the word "appealed" is significant here since it implies something more than submitting a specific question to the arbitrator. Black's Law Dictionary, 3d Edition, p. 123 (1933), gives the following definition:

> "APPEALED. In a sense not strictly technical, this word may be used to signify the exercise by a party of the right to remove a litigation from one forum to another . . ."
>
> "APPEAL . . . An 'appeal' in equity is a trial *de novo* . . ."

The case in question, the unsettled grievance with all pertinent records, is appealed to the arbitrator for his decision. Appeal to the arbitrator, as in the case of other appeals, can be, and usually is made by only one party. Arbitration, being in the nature of an equitable proceeding, proceeds to a *de novo* hearing in order to settle the unsettled grievance. Article XI, Section 2, specifically states that the arbitrator's decision shall be final, implying that the intent of the parties and the duty of the arbitrator is to supply a final settlement of

the grievance. There is no contractual provision for piecemeal decision of portions of the grievance without reaching a final disposition.

2. The Stipulation to Arbitrate Was Merely an Outline of Substantive Issues Involved in the Arbitration

Bearing in mind the contractual provisions for arbitration, it is apparent that the Stipulation to Arbitrate dated March 13, 1962 (R. 40-79), was nothing more than an outline of the substantive issues involved in the arbitration. The very first sentence of the stipulation states: "The matters submitted for arbitration involve the 'Grievances,' copies of which are attached hereto" (R. 40). Nineteen individual grievances were attached to the stipulation (R. 42-79). They varied not only in form, but also in subject matter and in the jobs involved.

A glance at the nineteen grievances submitted to Arbitrator Ross shows they involve fifteen different men contesting various job assignments in two different mills (R. 42-79); four of the men contesting assignments in each of the mills (R. 42, 44, 58, 60, 70, 72, 74, 78). Some of the grievances claim a failure to have a try-out on a job (R. 42-49, 58-79), some claim an inadequate try-out (R. 50-57), some claim a failure to be assigned a specific job (R. 42-63), some claim a failure to be assigned any job (R. 64-79), and all claim violations of the contract provisions involving seniority, fitness and ability.

This multiplicity of grievances to be presented to an arbitrator, unfamiliar with the individual grievances until the date of the hearing, clearly called for an out-

line of the basic categories into which the various grievances could be divided. On its face, the Stipulation to Arbitrate (R. 40-79) divides the grievances into categories and presents the basic substantive issue under which each category of grievances comes. The first question outlined in the Stipulation reads:

> "1. Did the company violate the Agreement of the parties dated July 7, 1960, (hereinafter referred to as the 'Basic Agreement') in not selecting A. H. Garrioch, Earl Stockman, Charles V. Ward, and Wesley Miller to try out for positions in the Blooming Mill operated by the company, *as claimed in the Grievances of said men attached hereto.*" (R. 40, emphasis supplied)

Each of the following three questions concludes with the identical language underlined in Question 1, to-wit: ". . . as claimed in the Grievances of said men attached hereto."

Not only did the Stipulation open with a sentence acknowledging that the matters submitted involve the attached *grievances,* but also, each of the four substantive questions set forth in the Stipulation referred back to the *grievances* themselves.

That the March 13 Stipulation was only an outline of substantive issues is further borne out by the Stipulation of the same parties dated February 16, 1962 (R. 29-32), which was entered into at the time of dismissal of a Superior Court suit to compel arbitration. The February 16 Stipulation has attached to it a letter outlining pending grievances. Section I of the Stipulation states:

> "I. It is agreed that the separate matters in-

volved in paragraphs I (a), (b) and (c) and 6 (a) of said letter shall be submitted to Mr. Arthur Ross for arbitration by him." (R. 29)

The paragraphs of the letter referred to read as follows:

"1. The grievances filed in three (3) groups, which were appealed, were as follows:

"(a) June 19, 1961, pertaining to *Job Placement by Seniority* for A. M. Garrioch, Frank Nichols, Earl Stockman, Charles Ward and Wesley Miller in the Blooming Mill Division;

"(b) June 22, 1961, pertaining to *Job Placement by Seniority and Application* for John Christian, Robert DeLong, George Isaacson and Jack Flynn to position applied for;

"(c) June 28, 1961, for Ed Stockman, Henry Lee Day and Everett Wright to fill newly created job of *Pusher Operator in Blooming Mill Division.*

. . .

"6. Grievances for *Positions of the Rolling Mill Division,* filed on the 15th, 18th and 19th of January, 1962, and answered by H. J. Stack on January 22 and 24, 1962, please be advised as follows:

" '(a) The Union wishes to appeal to arbitration (Article XI, Section 1) the grievances of M. Hughes, A. Garrioch, C. Ward, H. Schellen, A. Rhodes, C. Wogenson, P. Perfrement, M. Daniels, *Rolling Mill Division;* and E. W. Stockman and H. L. Day on the *Heating Division.*' " (R. 30, 31)

Again it will be noted that what were to be submitted Arbitrator Ross were the grievances outlined in the letter attached to the February 16 Stipulation. Section IV of that Stipulation provides: "Separate arbitration stipulations shall be submitted to each of the above

named arbitrators listing the *issues* to be considered and determined by them *as set forth above''* (R. 29, emphasis supplied). These statements from the February 16 Stipulation make clear what was the intent of the parties in later outlining the issues for the arbitrator in the March 13 Stipulation. There was no intent to supersede the contractual provisions dealing with arbitration, nor the grievances. The March 13 Stipulation was merely an outline of substantive issues involved in the arbitration.

B. The Arbitrator's Award, Deciding the Grievances in Line with the Written Terms of the Contract, Is Final

Article XI, Section 2, of the contract provides: ''The arbitrator shall render a decision in line with the written terms of the contract and said decision shall be final'' (R. 8, page 28).

Under the grievances involved herein, the primarily relevant written terms of the contract are those on ''Seniority'' set forth in Article IX, Section 1:

> ''It is understood and agreed that in all cases of promotion or increase or decrease of forces, the following factors shall be considered, and where factors 'b' and 'c' are relatively equal, the length of continuous service shall govern:
>
> ''(a) Continuous service
>
> ''(b) Ability to perform the work
>
> ''(c) Physical fitness.'' (R. 8, page 23)

Each grievance claimed that the employee's right under Article IX of the contract had been violated, and the appellee company's answer in most cases was that the employee's physical fitness and ability to perform

the work were not relatively equal to those selected (R. 42-79).

Arbitrator Ross found that the appellee company violated the seniority provisions of the contract in the selection of men for try-outs and for positions in the Blooming Mill and Finishing Mill (R. 14) and proceeded to formulate an award in accordance with those provisions.

Sections 1 and 2 of the award (R. 14) provide for pensioning of A. E. Rhodes immediately and H. H. Schillen in March, 1963, each of said men having reached compulsory retirement and pension age at the times mentioned. Surely, there could be no point in placing Mr. Schillen on one of the new jobs for training for the few months after the arbitrator's award and prior to his retirement; and the appellee company did not object to this portion of the arbitrator's award (R. 33-35). Both Rhodes and Schillen have been pensioned by the appellee and, therefore, the first two sections of the award are now moot.

Sections 3, 4 and 10 of the award merely approve job assignments made by the appellee company, finding them to be in accord with Article IX of the contract (R. 15, 16).

Section 5 of the award, in effect, provides try-outs for two senior grievants on specific jobs in the Finishing Mill, based on the ability and fitness; the arbitrator retaining jurisdiction in the event said men prove unsatisfactory; and Section 6 provides a similar try-out for a grievant, senior to the company's selectee for the position of Blooming Mill Operator, said grievant, ac-

cording to one of the tests given, having scored the highest in ability and fitness for said position (R. 15).

Section 7 of the award provides a try-out as Furnace Operator, the arbitrator retaining jurisdiction if the grievant proves unsatisfactory; and Sections 8 and 9 transfer men, previously selected for disputed jobs by the appellee company, and displaced by the arbitrator's award, to positions to which they are entitled over other grievants, because of seniority (R. 16).

Section 11 of the award dismisses the grievances of men with less seniority, ability or fitness than those awarded job try-outs (R. 16).

The final section of the award, Section 12, provides six months' back pay, diminished by unemployment compensation, supplementary unemployment benefits or earnings, to the four grievants who were wrongfully denied try-outs or jobs in the new mill and who are given such try-outs under the award (R. 16).

Each section of the award is in line with the written terms of the contract and combined they settle all of the grievances submitted for arbitration. In its request for reconsideration, the appellee company in no way challenged Sections 1, 2, 6, 8, 9, 11 or 12 of the award (R. 33-35).

Such objections as the appellee company did make were based on the ground that Finishing Mill selections could only be made on the basis of try-out, not assignment, there being no hint that the arbitrator had no power to award try-outs in that mill (R. 33-35). The grievances, however, speak for themselves and there

can be no doubt but that the arbitrator's award was a valid decision based on the grievances.

Since the parties, by collective bargaining, agreed that the arbitrator's decision, in line with the written terms of the contract, should be final, and, in reliance upon this, the Union agreed not to strike during the life of the contract, it follows that the appellee company should now be bound by Arbitrator Ross' award.

C. The Court, Violating Federal Policy, Substituted Its Contract Interpretation for that of the Arbitrator

"The present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578 (1960).

The *Warrior & Gulf* case *(supra)* discusses in detail the federal policy relating to labor arbitration, pointing out that arbitration under the collective bargaining agreement is a form of self-government, a part of the continuous collective bargaining process, which, rather than a strike, is the terminal point of disagreement between the parties (page 581). Further, the court discusses the arbitrator's unique qualifications for solving the grievances, qualifications involving an application of industrial common law—the practices of the industry and the shop—and of considerations not expressed in the contract (page 582). Dealing specifically with the problem of courts finding certain grievances beyond the scope of arbitration, the Supreme Court said:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think *only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail,* particularly where, as here, the exclusion clause is vague and the arbitration clause is quite broad. Since *any attempt by a court to infer such purpose necessarily comprehends the merits,* the court should view with suspicion any attempt to persuade it to become entangled in the substantive provisions of a labor agreement, even through the back door of interpretating the arbitration clause, when the alternative is to utilize the services of an arbitrator." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.W. 574, 584-585 (1960) (emphasis supplied).

The parties to a collective bargaining agreement do not bargain to have a court tell them what was their purpose in entering the arbitration clause of their agreement. This is clearly a prerogative of the arbitrator. Here, the parties did not agree to allow a court to interpret the arbitration clause and the supplementary stipulation to determine the parties' purpose, they agreed to be bound by the arbitrator's decision on these matters.

The lower court, in granting summary judgment, struck down all of the relief granted the individual grievants by the arbitrator. It substituted its interpretation of the arbitration provisions of the contract, its conclusions on the merits, and its determination as to the intent of the parties, for those of the experienced arbitrator, whom the parties had bargained should solve their grievances. Such conduct seems clearly violative of the following strong rules laid down for labor

arbitration cases in *United Steelworkers v. Enterprise Corporation,* 363 U.S. 593 (1960):

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award. As we stated in *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 . . ., decided this day, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.
>
> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There is the need for flexibility in meeting a wide variety of situations . . . " (pages 596-597) " . . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (page 599)

It must be borne in mind that, in exchange for the contractual guarantees of solution of all grievances through the arbitrational process, the appellant unions

and their members gave up the right to strike during the duration of the contract (R. 8, pages 27, 28). The Supreme Court has attached so much importance to this "no strike" feature of arbitration agreements that in the recent case of *Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95 (1962) it found that, although there was no "no strike" clause in the contract, "The grievance over which the union struck was, as it concedes, one which it had expressly agreed to settle by submission to final and binding arbitration proceedings" and the union was liable for damages since it breached an *implied* no strike clause. The unions here, having given up the right to strike in exchange for the contract's arbitration provisions, cannot be assumed to have, for no consideration, waived the right to have a solution of these vital grievances. [See *Independent Soap Workers v. Procter & Gamble Manufacturing Co.,* 314 F.2d 38, 42 (9th Cir.—1963).]

If "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail," *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 585 (1960), the trial court surely erred in finding in the instant case a purpose to exclude the power to make any remedy from the arbitrator's authority. An award finding that the appellee company had violated the contract in all respects, but which was unable to provide any remedy for the grievants would be a bitter Pyrrhic victory for the men who had lost their jobs and their seniority. Such a hollow award would not contribute to industrial peace, but by allowing the company, which had violated the contract, to proceed at its own pleasure, would leave the parties in more bitter in-

dustrial strife than they were in when the original grievances were filed fifteen months before.

The public policy of the United States, as voiced in recent Supreme Court opinions, was clearly violated by the trial court in usurping the role of the arbitrator.

II.

Assuming the Lower Court Not to Have Erred as a Matter of Law in Finding that the Contract Was Superseded by the Stipulation to Arbitrate, Issues of Material Fact Existed Preventing Summary Judment

In the preceding section of this brief appellants have argued that the moving party, the appellee company, as a matter of law was not entitled to judgment. On the contrary, appellants contend that, as a matter of law, the arbitration provisions of the collective bargaining agreement control and the arbitrator's award thereunder is final and binding. If this is, in fact, the case there would be no issues of material fact, and there would be no need to proceed with the following section of this brief.

Assuming *arguendo,* however, that the lower court was correct in finding that the contract's arbitration provisions (R. 8, page 28) were not governing as a matter of law, appellants contend that there were genuine issues of material fact relating to whether the Stipulation of March 13, 1962 (R. 40-79) superseded the contractual provisions. This section of appellants' brief is devoted to discussion of those issues, based on the lower court's conclusions of law.

Under Rule 56 (c) of the Federal Rules of Civil Procedure, a summary judgment can be granted only "if

the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

In *Byrnes v. Mutual Life Insurance Company of New York,* 217 F.2d 497 (9th Cir.—1954), this Court described the object of Rule 56, as follows:

> "The object of the procedure for summary judgment is not to *determine* an issue, but whether *there is an issue* to be tried . . .
>
> "Against the summary disposition of an issue stands the fundamental right to trial in open court by adversary proceedings, and through the testimony adduced therein on the issues tendered. The late Judge Cardozo has stated in simple, yet classic language, the condition which justifies a departure, under summary judgment, from this principle:
>
> " 'To justify a departure from that course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried.' *Curry v. MacKenzie,* 1925, 239 N.Y. 267, 270 . . ." (page 500).

A. An Issue Existed as to Whether the Parties Intended the Stipulation to Arbitrate to Limit the Arbitrator's Contractual Authority

Appellants contend that, at the very least, an issue existed regarding the parties' intent in making the Stipulation of March 13, 1962; and that (1) the documents themselves and (2) the contemporaneous documents and statements of the parties, bear out the existence of a genuine issue of material fact.

1. The Contract, Grievances and Stipulation, Read Together, Create an Issue of Fact

The collective bargaining agreement, on its face, gives rise to an issue as to whether the parties intended that there be any method of settling grievances not set forth therein. Article XI, "Adjustment of Grievances," reads:

> "*Section 1.* Should any differences arise between the Company and the Union, or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or as to any question relating to wages, hours of work and other conditions of employment of any employee, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle them promptly and in accordance with the provisions of this Agreement in the following manner:
>
> " . . . Third: In the event the dispute shall not have been satisfactorily settled the matter shall be submitted to arbitration under Section 2 of this Article.
>
> "*Section 2.* In the event that a grievance shall not have been satisfactorily settled by the Union and the Company, the case in question with all records pertaining thereto can then be appealed to an arbitrator to be appointed by mutual agreement of the parties hereto. The arbitrator shall render a decision in line with the written terms of the contract and said decision shall be final. . . .
>
> "*Section 6.* During the term of this Agreement, neither the Union nor its agents nor its members will authorize, instigate, aid, condone or engage in any work stoppage or strike. . . . " (R. 8, pages 26-28)

The contract provides that *any* differences shall be settled in this specific way, that there shall be no suspension of work, or strike, but that the parties shall proceed to settle the dispute *in accordance with the provisions of the Agreement.* These provisions, arrived at through the give and take deliberations of collective bargaining, should not be assumed to have been lightly set aside by a spur of the moment stipulation of counsel, unnecessary under the contract, not subjected to negotiation, totally without consideration, and which on its face would not solve the problems raised by the grievances (R. 23, 24).

The very grievances attached to the stipulation ask specific relief, not mere "yes" and "no" answers. They contain various requests for relief, among them the following: "Therefore, I request that I be given equal opportunity to learn the job mentioned above" (R. 42-49); "Therefore, I ask that I be given the job of Pusher Operator" (R. 58-63); and "Therefore, I ask the Company to reconsider their action and grant me a position which I am entitled to under the terms of the agreement. I also ask to be reimbursed for any losses I may have suffered due to their action" (R. 64-79).

The Stipulation to Arbitrate (R. 40), dated March 13, 1962, after the appeal of the grievances to arbitration and the selection of an arbitrator (R. 23, 24), does not purport to rescind or supersede the procedure for arbitration set forth in Article XI, Section 2, of the contract. It refers repeatedly to the basic agreement and to the specific grievances, embracing them rather than excluding them. Certainly, it recites "questions" under which the various grievances can be separated,

but always referring to the basic agreement and concluding "as claimed in the Grievances of said men attached hereto."

Reading the contract, the grievances and the Stipulation and giving meaning to each, it cannot be clearly stated that the parties intended to proceed to an arbitration which would only answer affirmatively or negatively the five questions set forth in the Stipulation. At the very least, it might be said that the intent of the parties was ambiguous and a factual issue existed in that regard.

2. Contemporaneous Documents and Statements of the Parties Raise an Issue of Fact

As pointed out at pages 14 and 15 of this brief, even before the Stipulation of March 13, 1962, was entered, the parties agreed to submit the grievances, outlined in the January 30, 1962, letter, to Arbitrator Ross. In this earlier Stipulation, the parties agreed to list the issues "as set forth above" for the arbitrator's decision. The issues "as set forth above" were the various grievances as divided into categories in the letter of January 30 (R. 29-32). This document supports the proposition that the parties intended to submit the grievances to the arbitrator together with an outline of their contents.

The Memorandum of the United Steelworkers (R. 24), drafted contemporaneously with the March 13 stipulation and served and filed at the same time as the stipulation was presented to the arbitrator, concludes:

> "Most of the employees with top seniority have been off the job in enforced lay off status since

> September, 1961. Their work for the Company will be at an end, due to automation and the Company's refusal to place them in the new jobs, unless they are placed in these new positions. Their years of accumulated seniority and pension benefits will be abandoned if they are not returned to the job. These are the very reasons why seniority agreements exist in contracts and why seniority must be protected by arbitrators, absent the clearest showing by the Company that the man does not have relative ability to perform the work.
>
> "It is for these reasons that *the grievants seek an award requiring that they be placed in the new jobs in accordance with the agreements between the parties and that they be awarded back pay with interest.*" (R. 24, 25, emphasis supplied)

In concluding his opening statement on behalf of the appellants at the arbitration hearing, counsel stated: " . . . we will ask that the men be given the jobs that they are entitled to under the contract, and that they be awarded whatever damages are appropriate" (R. 25).

At the close of the arbitration hearing, counsel for the appellee company stated in his concluding remarks: " . . . the details become quite important, because we would be committed to the men as finally growing directly or indirectly out of this arbitration" (R. 25, 26).

These documents and statements indicate a factual issue regarding the parties' intent as to the extent of the arbitrator's authority. So does the letter of agreement between the parties dated April 24, 1962, about a month after the hearing and before there was any intimation of what that arbitrator's decision would be. The letter confirms an agreement:

> " . . . that the grievances of the following employees regarding the selection of employees for new positions in the Finishing Mill shall be held in abeyance without prejudice to the position of either party until receipt of the decision of Arbitrator Ross in the matter of selection of employees for the Blooming Mill positions." (R. 86)

It is reasonable to assume that parties here were agreeing that they would hold certain other grievances in abeyance until Arbitrator Ross either found that the men selected by the company for the Blooming Mill positions were proper under the contract, or selected other men for those positions. If the parties did not intend the arbitrator to select the proper men for the positions in the event he found a contract violation, there would be no purpose in waiting to see what positions had been filled by the arbitrator. An issue of fact as to the parties' intent would certainly arise.

The fact that at no time prior to court action for enforcement did the appellee company even intimate that the arbitrator's power was limited to answering the stipulation's questions "yes" or "no," and that counsel for the appellee stated that the grievances would be attached to the stipulation and that the stipulation would serve merely as a general outline of the categories in which the several different grievances fell (R. 24), certainly raise genuine issues of material fact as to the intent of the parties.

The trial court was not free to weigh the evidence presented in the affidavits and decide the issues. On the motion for summary judgment, it was not to engage in trial by affidavit, but was required to treat the alle-

gations of the non-moving party, the appellant unions, as true, *Guinn Company v. Mazza,* 296 F.2d 441 (D.C. Cir.—1961). The trial court was not permitted to make a choice of inferences to be drawn from facts contained in the affidavits. "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold,* 369 U.S. 654 (1962). In deciding that there was no issue of material fact regarding the intent of the parties, the trial court disregarded these basic rules of summary judgment procedure.

B. An Issue Existed as to Whether Appellee Had Waived Any Right to Restrict the Arbitrator's Authority

The appellee company in the face of pleadings, evidence, arguments and conferences, all directed to providing the arbitrator with the knowledge necessary to place the grievants on the disputed jobs, if he found they were entitled to them under the terms of the contract, at no time objected, corrected or contended that the arbitrator could only give "yes" and "no" answers and could not shape a remedy to solve the grievances (R. 22-28). This contention was only made after the decision and award had been entered and this court action was begun to enforce the award.

Certainly, the appellee company could not lay back and gamble on the decisions of the arbitrator and the job selections made therein, and, only then, dissatisfied with the result, raise contentions on which it had been deceptively silent. Such conduct is similar to withhold-

ing objections until after a verdict, which is improper and prejudicial, *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239 (1939). Appellee waived the right to attempt to limit the arbitrator to answering the questions in the stipulation, and was estopped from raising the issue in the trial court. *Kreindler v. Judy Bond, Inc.,* 234 N.Y.S.2d 380, 382 (1962).

The silent acquiescence leading up to waiver began with the appellant unions' opinion brief and statement at the hearing, both of which requested that the arbitrator place the grievants on jobs (R. 24, 25). It continued throughout the hearing (R. 26). Four months after the hearing and two months before the award was issued, Arbitrator Ross announced his finding that the appellee company had violated the contract in filling the disputed jobs. At that time he gave the parties the option of allowing him to make an award placing grievants on disputed jobs, giving indemnification and otherwise disposing of the grievances, or of assisting him in making such an award (R. 13, 26, 96). Appellee company not only did not protest that the arbitrator had no authority to do more than answer the five questions "yes" or "no," which he had already done, but agreed to attempt to assist the arbitrator in formulating the award (R. 13, 26).

Even after the attempts to assist the arbitrator had failed, and he had issued his award, appellee company did not protest that he had no authority to place grievants on various jobs or give lost wages. In its motion for reconsideration, it merely raised specific arguments as to why the arbitrator's award regarding the Finish-

ing Mill was believed beyond the scope of the grievances (R. 36, 38).

Appellee company's conduct at the hearing and after, both before and after the award, viewed in the light most favorable to appellants, clearly points to a waiver of any right to limit the arbitrator's authority to the questions set forth in the stipulation.

CONCLUSION

This brief has been written in the belief that the trial court erred as a matter of law in finding that the arbitrator's authority was limited solely to answering five specific questions, and that he had no power to grant remedies required in the grievances.

Appellants contend that it is clear that summary judgment was improper herein, but have dwelt at length with the court's errors of law, because they feel certain that if they are correct as a matter of law, there would be no point in trying this case.

Appellants pray that the court reverse the court's errors which are matters of law and order judgment for appellants, or a hearing on the issue involved.

Respectfully submitted,

KANE & SPELLMAN
Attorneys for Appellants.

No. 18539

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FROMBERG, INC., a corporation,

Appellant,

vs.

GROSS MANUFACTURING COMPANY, INC., a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

Jurisdiction.

The action in the United States District Court for the Southern District of California, Central Division, was brought under the Patent Laws of the United States by the plaintiff-appellant, Fromberg, Inc., for infringement of United States Letters Patent 2,828,-791 by the defendant-appellee, Gross Manufacturing Company, Inc. Jurisdiction in the District Court is founded upon Title 28 of the United States Code, Section 1338(a) and Section 1400(b). This Court has jurisdiction to review the judgment entered by the District Court, by virtue of Title 28 of the United States Code, Section 1291 and Section 1294. The Complaint [Tr. 2] sets forth the basis for the District Court's jurisdiction, and the Answer [Tr. 5] admits that the cause of action of the Complaint is laid under the

Patent Laws of the United States. From the District Court's entry of Summary Judgment in favor of the defendant, the plaintiff appeals [Tr. 34].

Statement of the Case.

The introduction of tubeless tires presented certain problems to tire-repair men. Not only were these tires difficult to remove for application of an interior patch, but re-sealing the tire to the rim was often difficult on remounting. To solve these problems, plaintiff-appellant's assignor, Mr. Fromberg, developed a new apparatus including a repair gun and a cartridge for use in the gun. Patents were granted to Mr. Fromberg on both the gun and the cartridge.

The plaintiff-appellant brought this action in the District Court for infringement by the defendant-appellee of the patent 2,828,791 [Defendant-Appellee's Ex. "P"] covering the tire-repair cartridge. The patented cartridge includes an elongate metal tube, or shell containing a rubber repair element. The shell has one end beveled to facilitate insertion of the cartridge into a tire puncture from the exterior, while the tire remains mounted on the wheel. The other end of the shell is outwardly flared to provide a shoulder for holding the cartridge in the gun, as well as to facilitate placing the rubber repair element into the shell. The rubber repair element is cylindrical and is distorted to a small diameter by confinement in the shell. It is as though the rubber cylinder were stretched lengthwise, to be reduced in diameter. The metal shell holds the rubber cylinder in that distorted shape until the cylinder is released inside a puncture by the tire-repair gun.

The separate patent covering the repair gun is not asserted in this case.

In using a patented repair cartridge, as represented by Exhibits "A", "B", "C" and "D", it is first placed in the repair gun, then after being dipped in cement, the repair cartridge is forced into the puncture, with the aid of the repair gun. Next, the gun is operated to withdraw the shell from the puncture, while retaining the rubber cylinder in the puncture. As the shell is withdrawn, the rubber cylinder is released to expand in diameter and seal the tire puncture closed. The repair is thus completed in a few minutes while the tire remains mounted on the wheel.

Defendant-appellee manufactures and sells a kit for reconstituting the patented repair cartridges from shells of plaintiff-appellant's manufacture by refilling the shells from spent cartridges with new rubber cylinders. Defendant-appellee's kit includes: several rubber refills [Exs. "E", "F", "G", and "H"], a complete sample cartridge [Ex. "C", contended to be of plaintiff-appellant's manufacture] a holder [Ex. "J"] for use on plaintiff-appellant's shells while refilling, refilling instructions (not introduced in evidence), all contained in a carton [Ex. "K"].

The rubber refills, as shown in a photograph, Exhibit "L", are formed to include a rubber cylinder portion (the actual refill) and an integrally-formed tail that is cut off after it is used to pull the cylindrical portion into a distorted position in the shell of a spent cartridge. In advertising, and sales literature as Exhibit "M", defendant-appellee instructs persons engaged in the business of repairing tires to save shells from

plaintiff-appellant's spent cartridges and refill them with defendant-appellee's rubber cylinders.

Upon motion, based on the assertion that defendant-appellee does not make the containing shell of the patented cartridge, the District Court entered Summary Judgment, dismissing the plaintiff-appellant's Complaint.

1. Questions Presented.

The following basic questions are now before this Court:

1. Was there a single issue of fact before the District Court at the time of the Hearing on the Motion for Summary Judgment?
2. Did the defendant-appellee's affidavits establish as a matter of law that there was no genuine issue of a material fact at the time of the Hearing on the Motion for Summary Judgment?
3. Did the defendant-appellee's affidavits in support of the Motion for Summary Judgment establish as a matter of law that refilling shells from plaintiff-appellant's spent cartridges is not an act of infringement?
4. Did the defendant-appellee's affidavits in support of the Motion for Summary Judgment establish as a matter of law that defendant-appellee's advertising and sales literature do not actively induce infringement?
5. Does the finding that: one component of a patented structure serves temporarily, support a holding that replacing that component cannot be an act of infringement?

2. The Affidavits in Support of the Motion Present Material Issues of Fact.

At the time of the Hearing on the Motion for Summary Judgment, the District Court had before it affidavits presented by the defendant-appellee in support of the Motion for Summary Judgment, and affidavits by the plaintiff-appellant opposing the motion.

The motion was accompanied by an affidavit of defendant-appellee's president, Mr. W. M. Anderson [Tr. 10] stating that the purpose of plaintiff-appellant's cartridge shell is to dispense a rubber cylinder into the puncture hole of a tire. Mr. Anderson's affidavit further states that the shell can be used and reloaded many times, and provides a statement of the refill technique urged to customers by defendant-appellee.

Plaintiff-appellant's opposition to the Motion for Summary Judgment was accompanied by an affidavit of its executive vice president, Mr. T. E. Jordan, stating that the cartridge is designed for a single use, that the shell is not a dispenser and that refill of the empty shell to reliably accomplish another repair is not an economical practice.

Specification of Errors.

1. The District Court erred in granting the Motion of the defendant-appellee for Summary Judgment, and in granting Summary Judgment to the defendant-appellee.

2. The District Court erred in granting Summary Judgment because genuine issues of material fact existed.

3. The District Court erred in awarding Summary Judgment to the defendant-appellee since the defendant-appellee was not entitled to Summary Judgment as a matter of law.

4. The District Court erred in basing its conclusions of law upon a non-existent finding of fact, since Summary Judgment was granted without first establishing or finding that no genuine issue of material fact was before the Court.

5. The District Court erred in refusing to find that genuine issues of material facts were presented by a comparison of the defendant-appellee's supporting affidavits with the plaintiff-appellant's opposing affidavits.

6. The District Court erred in resolving issues of fact after having identified such issues.

7. The District Court erred in concluding as a matter of law that the doctrine of contributory infringement is not applicable simply because the component of plaintiff-appellant's patented structure sold by defendant-appellee has temporary use in the patented combination.

8. The District Court erred in concluding as a matter of law that actions under Title 35, U. S. C. Sec. 271(c) are barred if the component of the patented invention sold by an accused infringer has temporary use in the structure of the invention.

9. The District Court erred in concluding as a matter of law that replacement of an element having temporary use in a patented combination cannot be an act of infringement.

10. The District Court erred in concluding as a matter of law that inducing persons to replace an element having temporary use in a patented combination cannot be an act of infringement.

Summary of Argument.

The Summary Judgment entered by the District Court in the present case is in error and should be reversed. Not only are there genuine issues of material fact ignored by the District Court, upon which a trial must be had, but the District Court erred in identifying such issues and decided the issues on the basis of the affidavits presented in support of, and in opposition to the Motion for Summary Judgment.

An issue on which plaintiff-appellant requests a definitive pronouncement by this Court (regardless of whether it reverses on the grounds that other issues exist) is the consideration for determining the application of Title 35, U. S. C. Sec. 271(c), and the parameters for resolving whether reconstituting a patented structure is a permissible "repair" or an infringing "reconstruction".

The refusal of the District Court to apply Title 35, U. S. C. Sec. 271(c) resulted in disregarding the established principles of the doctrine of "repair" versus "reconstruction", and granting Summary Judgment without basis according to established requirements.

ARGUMENT.

1. Genuine Issues of Material Fact Ignored by the District Court.

Federal Rule of Civil Procedure 56 authorizes Summary Judgment only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. As this Court stated in *Cee-Bee Chemical Co., Inc. v. Delco Chemicals, Inc.*, 263 F. 2d 150, 153, 120 U. S. P. Q. 72, 74 (C. A. 9, 1958):

> ". . . the presence of a single genuine issue as to a material fact precludes disposition of a case by summary judgment."

Considering the major issue of fact before the District Court, the affidavit of defendant-appellee's president, Mr. W. M. Anderson [Tr. 10] stating that the shells of plaintiff-appellant's cartridges are capable of inserting many plugs into tires was accepted as the entire basis for granting the Summary Judgment. The affidavit of Mr. T. E. Jordan [Tr. 19], filed by plaintiff-appellant states that the cartridge is designed for a single use, and refill for reliable operation is not economical. The true nature of the cartridge and the true nature of re-using the shell are thus in dispute.

The affidavits are in conflict as to whether the reuse of the cartridge shell is similar to placing a fresh roll of toilet paper in a dispenser designed to serve many, many rolls, or is like refilling a "kleenex" box with interleaved tissues so that they are served in a novel "pop out" fashion. Reloading the toilet paper dispenser is certainly a simple repair operation, and not

a reconstruction. However, refilling an empty "kleenex" box with interleaved tissues is clearly not a repair, but would necessarily be deemed a reconstruction of the entire package.

In the hypothetical patent situation, there is no question that "kleenex" boxes could be reclaimed, and reused several times, just as virtually anything in the realm of mechanics can be accomplished today if one is willing to pay the price. On the same basis, plaintiff-appellant's shells can be refilled. However, a completely unconsidered issue in this case is whether or not the price of refilling shells is paid only to attempt avoiding patent infringement. The affidavits submitted to the District Court present an issue on the feasibility of reusing plainiff-appellant's cartridge shells for any other reason. That issue is one of material fact which must be resolved in the determination of this case.

2. Misapplication of the "Repair Versus Reconstruction" Rule.

Defendant-appellee has been charged with infringement in accordance with 35 U. S. C. Sec. 271(a), (b), and (c) which states:

> "§271. Infringement of patent
>
> (a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.
>
> (b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process constituting a material part of the invention knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

A. Direct Infringement Under Section 271(a).

The extent to which defendant-appellee has actually reconstituted patented structures is not of record. However, it is difficult to perceive that any kit could be brought to market with no actual tests of the product by defendant-appellee. If such tests did in fact occur, they are adequate to establish infringement on the basis that only one infringing act is necessary to establish liability, *Neff Instrument Corporation v. Cohu Electronics, Inc.*, 269 F. 2d 668, 122 U. S. P. Q. 554 (C. A. 9, 1959).

B. Actively Inducing Infringement Under Section 271(b).

Defendant-appellee admits teaching potential customers to reconstitute plaintiff-appellant's cartridges by the submission of Exhibit "M" of Mr. W. M. Anderson's affidavit [Tr. 10]. Exhibit "M" represents an advertisement by defendant-appellee summarily describing a process to reconstitute plaintiff-appellant's cartridges by using defendant-appellee's kit.

The extent that advertisements similar to Exhibit "M" have been published by defendant-appellee has not

been established; however, the single advertisement submitted establishes actively inducing infringement. Publications of this type have been held actionable even if the element urged for sale was a staple article of commerce suitable for substantial non-infringing use. Such a holding was made under 35 U. S. C. Sec. 271(b) in *Shumaker v. Gem Manufacturing Co.,* 136 U. S. P. Q. 20, 23 (C. A. 7, 1962):

> ". . . the defendant may not with impunity continue the practice of picturing the infringing use on its cartons, in its catalogs and in its instruction sheets, or selling its product with directions for mounting it in an infringing manner".

C. Contributory Infringement Under Section 271(c).

Defendant-appellee's kit includes a component of the patented apparatus, *i.e.,* the rubber cylinder. The kit is especially adopted to reconstitute the patent cartridge, and it is not a staple article, suitable for substantial non-infringing use. Contributory infringement under the code is established, unless, reconstituting the patented cartridge is simply a repair.

The District Court resolved each of the charges of infringement on the basis that because the rubber cylinder has only temporary use in the patentable combination there can be no infringement. The Court stated:

> "There are, no doubt, many cases holding that where the manufacture and sale of a single element of a patented combination with the intent that it shall be used with the other elements and so complete the combination, is an infringement if the use of the added elements constitutes a 're-

> construction' of the original device, but not, if it constitutes only a 'repair'. *Morgan Envelope Company v. Albany Paper Company,* 152 U. S. 425. But as pointed out in the Morgan Envelope case, these cases have no application to one where the element made by the alleged infringer is an article of manufacture, perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically whenever the device is put to use. Although it cannot be said in the instant case that the rubber plug is perishable, it nevertheless has only a temporary use in the patentable combination." Memorandum Opinion [Tr. 23].

The District Court based the Summary Judgment on the conclusion of fact that the rubber cylinder has only a temporary use in the patented combination. This criteria for determining a repair would totally nullify the established statutory and case-law doctrine of contributory infringement. In any case of this type alleging contributory infringement, there is one element whose use is "temporary" relative the other elements, otherwise the doctrine would never be invoked. Therefore, if the criteria of "temporary" use determines a "repair", there are no instances of "reconstruction".

The *Morgan Envelope* case, applied by the District Court, involved replacing a roll of toilet paper in a permanent fixture designed and intended to dispense many rolls. The patent covered the combination of the paper roll and the fixture. The sale of the paper roll was accused as contributory infringement. In that case, the Court held no infringement; however, that

Court clarified the judgment in commenting on a hypothetical case almost identical the facts of the present case.

The comment was made in distinguishing *American Cotton Tie Co. et al. v. Simmons et al.,* 106 U. S. 89, 1 S. Ct. 52, which involved reconstructing cotton-bale ties by providing new metal bands for previously-used buckles or fasteners, held to be an act of infringement. The *Morgan Envelope* judgment stated:

> "It is evident that the use of the tie was intended to be as complete a destruction of it as would be the explosition of a patented torpedo. In either case, the repair of the band or the refilling of the shell would be a practical reconstruction of the device."
>
> *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.,* 152 U. S. 425, 429.

Relative this quotation, it is clear the Court intended an explosive gun cartridge by the term "torpedo" rather than the self-propelled naval bomb which the term contemporarily defines, because upon detonation of the latter, no shell remains for possible reuse.

The act involved in the present case, refilling the shell of a spent tire-repair cartridge is analogous to refilling an exploded gun cartridge, and under the *Morgan Envelope* case would be a reconstructing act amounting to patent infringement.

D. The Repair Versus Reconstruction Doctrine.

The repair versus reconstruction doctrine was urged in several cases prior to the enactment of 35 U. S. C. Sec. 271 in 1952; however, those cases are somewhat divergent on the parameter to classify reconstituting a patented apparatus as a permissible "repair" or an infringing "reconstruction".

A landmark case in the doctrine of contributory infringement, under which the repair versus reconstruction doctrine has often been raised, is *American Cotton Tie et al. v. Simmons et al.,* 106 U. S. 89, 93, 1 S. Ct. 52. In that case, the Supreme Court stated:

> "A buckle without a band will not confine a bale of cotton. Although the defendants used a second time buckles originally made by those owning the patent and put by them on the market; they do not use a second time the original bands in the condition in which those bands were originally put forth with such buckles. They use bands made by piecing together several pieces of the old band. The band in a condition fit for use with the buckle is an element in the 3rd claim of the Brodie reissue. That claim is for a combination of the open slot arranged to allow of the sidewise introduction of the band, the link or buckle with the single rectangular opening arranged so as to hold both ends of the band, and the band. The old buckle which the defendants sell has the slot of Cook, and the slot and rectangular opening of Brodie, and the slot and arrow shaped opening of McComb. Whatever right the defendants could acquire to the use of the old buckle, they

> acquired no right to combine it with a substantially new band, to make a cotton bale tie. They so combined it when they combined it with a band made of the pieces of the old band in the way described. What the defendants did in piecing together the pieces of the old band was not a repair of the band or the tie, in any proper sense. The band was voluntarily severed by the consumer at the cotton-mill, because the tie had performed its function of confining the bale of cotton in its transit from the plantation or the press to the mill. Its capability for use as a tie was voluntarily destroyed. As it left the bale it could not be used again as a tie. As a tie the defendants reconstructed it, although they use the old buckle without repairing that. The case is not like putting new cutters into a planing-machine, as in *Wilson v. Simpson,* 9 How., 109, in place of cutters worn out by use. The principle of that case was, that temporary parts wearing out in a machine might be replaced to preserve the machine, in accordance with the intention of the vendor, without amounting to a reconstruction of the machine."

This case is still good law and was cited with approval in the recent case *Aro Manufacturing Co., Inc. et al. v. Convertible Top Replacement Co.,* 365 U. S. 336 (1961) which is considered below.

The factual similarity of the *Cotton Tie* case to the present case is clear. The *Cotton Tie* case involved providing substantially a new band for use with metal buckles from spent ties to reconstitute the patented

structure. The present case involves providing new rubber cylinders for use with shells from spent cartridges to reconstitute the patented structure. As a cartridge, defendant-appellees reconstruct it, although they use the old shell. It is noteworthy that in the *Cotton Tie* case, the Court considered the severance of the bands by a purchaser a voluntary destruction of the tie, recognizing it had served its purpose. The intended use of the product by the purchaser is thus recognized as a parameter in determining permissible "repair" or infringing "reconstruction".

Intention of use has been a parameter to resolve this question in several cases. *William v. Hughes Tool Co.,* 87 U. S. P. Q. 354 (C. A. 10, 1950) for example, concluded welding new teeth on a drill bit to be an infringing reconstruction, on the basis that the intended design of the bit did not encompass the rebuilding in question.

The design of a "kleenex" package in the hypothetical situation clearly does not suggest the box was intended for refill and such refill would clearly be a reconstruction. Conversely the basic design of a phonograph manifests an intention for repeated use with different records. *Leeds & Catlin Company v. Victor Talking Machine Company,* 212 U. S. 325, 53 L. Ed. 817 (1909) held such re-use to be a repair. Other cases which fit the "intention of design" parameter (but were not necessarily resolved on that parameter) include: *Bowdil Co. v. Central Mine Equipment Co.,* 56 U. S. P. Q. 98 (D.C. E.M. 1942) replacement of cutting bits in a mining machine held a repair; *Westinghouse Electric and Manufacturing Co. v. Hes-*

ser, 131 F. 2d 406, 56 U. S. P. Q. (C. A. 6, 1942) replacing burned grate bars in an automatic stoker held a repair; *Landis Machine Co. v. Chaso Tool Co., Inc.,* 61 U. S. P. Q. 164 (C. A. 6, 1944) replacing thread cutters in cutting heads, held a repair, and *Micromatic Hone Corp. v. Midwest Abrasive Co.,* 177 F. 2d 934, 83 U. S. P. Q. 409 (C. A. 6, 1949) replacing an abrasive stone in a holder, which was obviously intended to be replaced from time to time at short intervals, held a repair.

These cases are the significant decisions prior the 1952 enactment of 35 U. S. C. Sec. 271(c) and before the recent case, *Aro Manufacturing Co., Inc. v. Convertible Top Replacement Co., Inc.,* 128 U. S. P. Q. 354, 365 U. S. 336 (S. Ct. 1961) which interprets the 1952 enactment 35 U. S. C. Sec. 271.

The *Aro* case involved a combination patent on a convertible automobile top, and the ultimate question as stated in the majority opinion became:

> ". . . whether such a replacement by a car owner is infringing 'reconstruction' or permissible 'repair'."

The patented convertible top, in addition to the fabric portion, included metal frame members, wipers for pressing portions of the fabric against the automobile body and actuated simultaneously with the frame members, a rain trough, etc., *Aro Mfg. Co. v. Convertible Top Replacement Co.,* 270 F. 2d 200, 203, 122 U. S. P. Q. 536, 538 (C. A. 1, 1959).

Thus in the *Aro* case, replacement of one short-lived unpatented element in a multiple-element patented

combination was involved. It is well known that the fabric portion of the top of a convertible automobile has a useful life of two or three years, whereas the automobile and frame work and mechanism of the top has the useful life of eight to ten years or even longer. The intention of design for a convertible top would clearly contemplate the replacement of several canvas coverings during the life of the entire mechanism. The parameter, intention of design, is clearly manifest in the *Aro* case, on the basis that the patented structure was designed in contemplation that the canvas portion would be replaced. The Court resolved such action to be a repair and held no infringement.

In the present case the intention of design has not been determined; however, the question has been given judicial consideration in the very recent and as yet unreported case, *Fromberg, Inc. v. Jack W. Thornhill, et al.,* Case No. 19764 (C. A. 5, 1963). The facts of that case are very closely related to those of the present case. The patent in suit in the Fifth Circuit *Fromberg* case was the same patent in suit in the present case; however, the actions of the defendant in that case were somewhat different. Defendant in the reference case manufactured and sold a rubber refill similar to defendant-appellee's Exhibits "E", "F", "G", and "H", without incorporating them in a kit as manufactured by defendant-appellee herein and without such expressed purpose for reconstituting plaintiff-appellant's cartridges. Furthermore, advertising as manifest by defendant-appellee's Exhibit "M" instructing users on refill methods, was not established in the cited *Fromberg* case.

The decision of *Fromberg, Inc. v. Jack W. Thornhill* acknowledged the validity of the patent here in suit, and held the sale of rubber refills to be acts of infringement. In this regard, the Court stated:

> "The principal point of this query is whether, when sold by the patentee, it is reasonably contemplated that the device will be repeatedly used. The patent is for a tire repair unit. The patent is not for a means by which a rubber plug can be inserted efficiently in a tire. If that were so, the patent would essentially cover only the hollow metal tube —an ancient and certainly non-novel thing. Designed, manufactured and sold as a unit, it is likewise used as a unit. Once the rubber plug is extruded into the tire, that part cannot ordinarily be used again. Nor is it expected that the metal tube will be. It has a single-shot function and purpose for a one-time use.
>
> "That brings the case precisely within *American Cotton Tie Co. v. Simmons,* 106 U. S. 89, 1 S. Ct. 52, 27 L. Ed. 79. There the patent was on metal bands used to bind cotton bales. To open the cotton bale, the metal bands were cut."

The Court thus found the action to be infringing "reconstruction" and that the defendants were inducing infringement by others under Section 271(b). With regard to contributory infringement under Section 271(c), the Court remanded the case for determination as to whether or not the rubber refills were a staple article of commerce suitable for substantial non-infringing use.

Clearly, the District Court's entry of a Summary Judgment in the present case has precluded plaintiff-appellant the opportunity to establish that its cartridge is not reasonably contemplated to be repeatedly used, whether or not defendant-appellee's kit is a staple article or commodity of commerce suitable for substantial non-infringing use, and in fact whether or not patent infringement is present. The District Court's failure to recognize these genuine issues of material fact is error which demands reversal by this Court.

3. Summary Judgment Based Upon a Non-Existent Finding of Fact.

As stated in *New and Used Auto Sales, Inc. v. Hansen,* 245 F. 2d 951, 953 (C. A. 9, 1957):

> "In the Summary Judgment the Court does not recite that 'there is no genuine issue as to any material fact as the rule requires, but instead recites 'there are no facts the determination of which turns on credulity.' This recital alone is sufficient to vitiate the judgment."

More recently, in *Neff Instrument Corporation v. Cohu Electronics, Inc., et al.,* 269 F. 2d 668, 122 U. S. P. Q. 554, 558 (C. A. 9, 1959), the Court stated:

> "We affirm the technical rule, sufficient in itself to require reversal in this case, that the Court below made no finding that 'there is no genuine issue as to any material fact', as the rule requires before a Summary Judgment may be granted."

The Findings of Fact [Tr. 27] in the present case are similarly defective. The District Court made no finding at all as to the presence or absence of issues of material fact.

4. District Court Summarily Resolved Issues of Fact.

As to the facts specifically found by the District Court, reversible error was committed when the District Court resolved the issues of fact after having identified such issues. This practice was clearly condemned by this Court in the case of *Cee-Bee Chemical Co., Inc. v. Delco Chemicals, Inc.*, 263 F. 2d 150, 120 U. S. P. Q. 72 (C. A. 9, 1958).

Specifically, the District Court resolved issues of material fact in concluding: the cartridge shells dispense the rubber cylinders; the cartridge shells are capable of insertimg many rubber cylinders; and the rubber cylinder must be replaced to utilize the combination as a whole.

The error committed by the District Court in entering Summary Judgment based on a non-existent finding of fact, in resolving issues of fact before the Court, and in ignoring the presence of other important genuine issues of material fact must be corrected by this Court.

5. Burden for Summary Judgment Not Met by Defendant-Appellee.

> "On a motion for summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the Court. . . . On appeal from an order granting a defendant's Motion for Summary Judgment the Circuit Court of Appeals must give the plaintiff the benefit of every doubt." *Walling v. Fairmont,* 139 F. 2d 318, 322 (C. A. 8, 1943).

The burden under Rule 56 was not met by the defendant-appellee in the District Court. The principal question of fact discussed above was presented before the Court at the time of the Hearing. Further, the defendant-appellee's affidavits were inadequate to fully establish the material issues to be resolved in the determination of the present case.

Conclusion.

The Court should reverse the judgment on the basis of each of the several grounds stated above and should remand the case with instructions to find infringing activity on the part of defendant-appellee.

Respectfully submitted,

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Attorneys for Plaintiff.

Exhibits.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Byard G. Nilsson

No. 18539

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FROMBERG, INC., a corporation,

Plaintiff and Appellant,

vs.

GROSS MANUFACTURING COMPANY, INC., a corporation,

Defendant and Appellee.

BRIEF OF DEFENDANT-APPELLEE THE GROSS MANUFACTURING COMPANY.

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No. 18539

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BRIEF OF DEFENDANT-APPELLEE THE GROSS MANUFACTURING COMPANY.

Jurisdictional Statement.

Defendant-appellee concurs in the jurisdictional statement appearing in Plaintiff-appellant's Brief.

Introduction.

The only issue concerning infringement of the patent in suit is a question of law, that is, whether or not an unpatented component (a rubber plug) may be replaced in the durable component (a metal shell) of the claimed combination without infringement. The District Court, on the basis of facts which are not disputed, granted a summary judgment declaring that the patent in suit was not infringed. On the question

of infringement of the patent in suit, no genuine issue of material facts exists.

> "Summary judgment represents a most useful legal invention to save time and expense, by the avoidance of a trial, when there exists no material fact-issues. It may well be that, in a patent case, a judge should exercise unusual caution in granting a summary judgment. But there are patent cases where it would be an absurd waste of time and effort to deny such a judgment. *This is such a case.* (Italics added.)
>
> *Vermont Slate Co. v. Tatko Bros.* (2nd Cir., 1956), 233 F. 2d 9, 10, cert. den. 352 U. S. 917, 77 S. Ct. 216; 1 L. Ed. 2d 123.

Statement of the Case.

The plaintiff-appellant manufactures and sells tire repair cartridges consisting of an elongated metal shell and a cylindrical rubber plug compressed within the shell as is described and claimed by the patent in suit No. 2,828,791. [Exs. A, B, C, D and P.] The rubber plug as well as the shell are unpatented components of the combination covered by the claims of the patent in suit. [Ex. P.] The purpose of the tubular metal shell of the cartridge sold by the plaintiff and as described and claimed in the patent is to dispense or install the rubber plug positioned therein into an opening in a tire to repair the same. As stated by the inventor, Aaron J. Fromberg, in the patent in suit:

> "The object of this invention is, therefore, to provide means for installing a stem of resilient material in an opening through a motor vehicle tire

with the stem extended through the opening in the tire in which the stem is inserted by a rigid member. . . ." [Ex. P., Col. 1, lines 58-61.]

The rubber plug or stem is ejected from the tubular metal shell into the opening in the tire by an applicator such as the device 20 illustrated in the patent in suit. [Ex. P.] The tubular metal shell of the tire repair cartridge is capable of inserting many of the rubber plugs into puncture holes in tires. It is only necessary to place another rubber plug into the empty metal shell sold by the plaintiff-appellant to enable the shell to be used again to repair a tire. [R. 11, 12.]

The tire repair cartridges sold by the plaintiff-appellant do not carry any notice restriction which informs the purchaser that he may use the metal shell only once. [Exs. A, B, C and D.]

The defendant-appellee manufactures and sells tire repair kits consisting of one of the plaintiff's cartridges [Ex. A] ready for use and 20 or more unpatented rubber tire repair plugs [Ex. E] adapted for refilling or reloading the empty metal cartridge shells. The defendant-appellee teaches its customers that its rubber tire repair plugs may be used to reload or refill the rubber tire repair cartridges sold by plaintiff. [Ex. M.] Thus, the tire repairman in purchasing defendant's kit need not purchase a new metal cartridge shell for each unpatented rubber plug that is dispensed or installed into a tire to repair a leak.

The defendant has not manufactured any metal shells of the type referred to in the patent in suit. [R. 11.]

This suit was filed on June 6, 1962 charging the defendant with infringement, contributory infringement and active inducement of infringement of the patent in suit. The District Court granted defendant-appellee's motion for summary judgment based on the undisputed facts as set forth in the affidavits and the exhibits submitted therewith on October 24, 1962. [R. 23-25.] The District Court later entered Findings of Fact, Conclusions of Law and Judgment as prepared by the defendant's counsel on December 5, 1962 [R. 27-32] and plaintiff-appellant filed a notice of appeal to this Court on January 3, 1963.

Summary of Argument.

There are no genuine issues of any material fact concerning the question of infringement. On the basis of the undisputed facts the District Court correctly held that there is no infringement in the replacement of the spent unpatented rubber plug in the metal shell of the patented tire repair cartridge sold by plaintiff-appellant.

The Supreme Court has steadfastly refused to extend the patent monopoly to cover and thereby to restrain trade in unpatented components of a patented combination. A patentee is entitled only to a monopoly on the totality of the elements in the claims and no element, separately viewed, is entitled to the protection of his patent.

The law is crystal clear that an owner of the patented tire repair cartridge may replace the spent rubber plug to maintain the use of the whole combination without being liable for infringement.

ARGUMENT.

I.

There Are No Genuine Issues of Any Material Fact Concerning the Question of Infringement.

The nature of the patented tire repair cartridge, that is the tubular metal shell, and the cylindrical rubber plug compressed therein was before the trial court and is before this Court as a physical exhibit. [Exs. A, B, C and D.] The affidavit of Mr. W. M. Anderson clearly establishes that the shell of the tire repair cartridge sold by the plaintiff-appellant is capable of inserting many of the unpatented expendable rubber plugs into puncture holes in tires. [R. 11.] The plaintiff-appellant did not dispute this fact. Instead of questioning this obvious fact, the plaintiff-appellant's president T. E. Jordan [R. 19-20] merely stated that ". . . the shell portion of a Fromberg rivet is designed for a single use and to reclaim such shells and refill them for reliable operation is not economically feasible." [R. 20.] This statement is in complete agreement with the fact that the tubular metal shell of the Fromberg cartridge is capable of inserting many tire repair plugs into tires. The present litigation would not even exist if the Fromberg cartridge could not be reloaded with new unpatented rubber plugs. Whether or not it is economically feasible for the tire repairman to insert a new rubber plug is, of course, something for the tire repairman to decide for himself and is not relevant to the issues of infringement.

There is no issue of fact in this case of defendant-appellee's reclaiming of the empty Fromberg shells. In the absence of any disputed issues of fact, the Court is authorized by Rule 56 of the Federal Rules of Civil Procedure to decide the case as a matter of law.

Park-In-Theatres v. Perkins (9th Cir., 1951), 190 F. 2d 137;

Allen v. Radio Corporation of America (D. C. Del., 1942), 47 Fed. Supp. 244.

In *Steigleder v. Eberhard Faber Pencil Co. et al.* (1st Cir., 1949), 176 F. 2d 604, 605, cert. den. 338 U. S. 893, 94 L. Ed. 590, 70 S. Ct. 494, the Court held:

> "Summary judgment under Rule 56(c), Federal Rules of Civil Procedure, 28 U.S.C.A., is sometimes appropriate in a patent case, at least on the issue of infringement. Where it is apparent that there is no genuine issue of fact bearing on infringement, and the structure and mode of operation of the accused device are such that they may be readily comprehended by the court, and compared with the invention described and claimed in the patent, without the need of technical explanation by the testimony of expert witnesses, then the court, if satisfied that there is no infringement, should give summary judgment for the defendant, instead of subjecting the parties to the expense of a trial. . . ."

The District Court properly granted defendant's motion for Summary Judgment since there are no issues of material fact concerning infringement.

II.

The District Court's Memorandum Opinion and Findings of Fact Serve the Important Function of Advising This Court of the Basis of the District Court's Judgment.

This Court has observed that findings of fact and conclusions of law are unnecessary in granting a summary judgment since such a judgment means there are no material facts in dispute. However, such findings have been held to be permissible for the purpose of providing a good summary of the District Court's Judgment.

Lindsey v. Leavy (9th Cir., 1945), 149 F. 2d 899, cert. den. 326 U. S. 783, 90 L. Ed. 474;

Dana Perfumes, Inc. v. Mullica (9th Cir., 1959), 268 F. 2d 936.

In the Memorandum Opinion the District Court found:

> "The plaintiff manufactures and sells tire repair cartridges consisting of an elongated shell, somewhat like a rifle shell but open on both ends, and a cylindrical rubber plug compressed within the shell. It is the purpose of this shell, when used with an applicator, to dispense the rubber plug therein contained into an opening in the tire to repair the same. In order to re-use the metal shell it is only necessary to place therein another rubber plug. Neither the shell nor the rubber plug are patentable components, but it is the combination which is claimed as a subject of the patent in suit.

"The defendant manufactures and sells rubber repair plugs adaptable for reloading plaintiff's metal shells and teaches its customers that its plugs may be used to reload plaintiff's empty shells by following simple instructions furnished by defendant. Defendant also purchases plaintiff's cartridges and sells tire repair kits consisting of one of plaintiff's cartridges, ready for use, and 20 or more rubber plugs of defendant's manufacture, furnishing therewith instructions as to how to refill plaintiff's shells.

"Upon these facts plaintiff sues for infringement of its patent and the matter comes before us on defendant's motion for summary judgment. Defendant urges that all the facts hereinabove stated are undisputed and that they establish non-infringement. With this conclusion we agree." [R. 23, 24.]

This finding clearly states that there is no genuine issue of any material fact necessary to the consideration and determination of the motion for summary judgment. This finding is clearly supported by the affidavits of W. M. Anderson [R. 10] and T. E. Jordan [R. 19], the patent in suit [Ex. P] and the physical Exhibits A, B, C, D, E, F, G, H, J, K, L and M which were before the District Court. This finding clearly meets the requirements of Rule 56 of the Federal Rules of Civil Procedure and the decisions of this Court in *New and Used Auto Sales v. Hansen* (9th Cir., 1957) 245 F. 2d 951; *Neff Instrument Corporation v. Cohu Electronics, Inc.* (9th Cir., 1959), 269 F. 2d 668.

Finding of Fact No. 5 is as follows:

> "5. U. S. Letters Patent No. 2,828,791, the patent in suit, is directed to the combination of two components, that is, an elongated rigid shell (having an outwardly flared portion at one end and a beveled outer surface on the other end) and a cylindrical element or plug of resilient material such as rubber positioned within the shell in a contracted state. The rubber plug as well as the shell are unpatented components of the combination described by the claims of the patent in suit." [R. 28]

Finding No. 5 merely sets out the combination that is covered by the claims of the patent in suit and the undisputed fact that both the rubber plug and the shell are unpatented components.

> "7. In use of the tire repair cartridge disclosed by the patent in suit, the outwardly flared portion of the shell is gripped in an applicator, as shown in Fig. 1 of the patent, and the shell is forced through an opening in a tire. The applicator contains a plunger which passes downwardly through the tubular shell as the shell is drawn outwardly through the opening in the tire so that the stem is extruded from the shell leaving the stem to seal the opening within the tire. The empty shell may then be reloaded by placing another rubber plug therein and the tire repairing procedure repeated." [R. 28, 29.]

Finding 7 sets out the procedure for repairing an opening in a tire with the patented tire repair cartridge. These facts are not disputed.

> "9. It is the purpose of the tubular metal shell of the tire repair cartridge sold by the plaintiff, and as disclosed and claimed in the patent in suit, when used with an applicator, to dispense the rubber plug positioned therein into an opening in a tire to repair the same." [R. 29.]

Finding 9 points out that the metal shell when used with an applicator dispenses the rubber plug into an opening in a tire. The facts concerning the use of the metal shell and rubber plug with an applicator to repair an opening in a tire are set forth in the patent in suit and are not disputed. However, the plaintiff-appellant objects to the use of the term "dispense" and would apparently prefer to describe the shell as "installing" the rubber plug into the opening in a tire instead of "dispensing" the plug. The argument is obviously one based on semantics. The fact is undisputed that the rubber plug is dispensed from or pushed out of the shell to repair a tire thereby leaving the shell available for refilling with a new unpatented rubber plug. Where only the legal effect of factual occurrences and conclusions to be drawn from them are in dispute, there is no genuine issue of material fact and the cause may be determined on a motion for summary judgment.

> *Bank of China v. Wells Fargo Bank & Union Trust Co.* (D. C. Cal., 1952), 104 Fed. Supp. 59, 63, affirmed (9th Cir., 1953), 209 F. 2d 467.

> "11. The rubber plug positioned within the shell of plaintiff's tire repair cartridge has only a temporary period of usefulness in the claimed combination and must be replaced after each repair is made with the shell for the continued utilization of the claimed combination as a whole." [R. 29.]

The plaintiff-appellant does not dispute the facts set out in Finding 11 but instead contends that the District Court resolved issues of fact in concluding ". . . the rubber cylinder must be replaced to utilize the combination as a whole." (Appellant's Br. p. 21.)

Obviously once the rubber plug has been removed from the shell it must be replaced if the tire repair cartridge is to have continued utilization for repairing additional tires. The plaintiff-appellant's contention of an error on the part of the District Court is not based on an error in resolving a factual issue at all but is based on an issue of law. This issue of law is the heart of the entire controversy, that is, does the owner of one of plaintiff's tire repair cartridges have the right to replace the spent rubber plug so that the combination of the shell and plug may be used again or must he throw the metal shell away after he has made only one repair.

All of the foregoing findings find support in the record before the District Court. They explain the Court's conclusion and show why infringement of the patent in suit does not exist as a matter of law.

III.

Neither Contributory Infringement nor Active Inducement of Infringement Can Exist Unless There Is Direct Infringement.

The plaintiff-appellant contends that the defendant-appellee is guilty of direct infringement by placing a new unpatented rubber plug into a Fromberg cartridge shell; that defendant-appellee is guilty of actively inducing infringement by informing customers and potential customers that the empty Fromberg metal shells may be reloaded by unpatented rubber plugs of defendant-appellee's manufacture; and that defendant-appellee is guilty of contributory infringement for selling the unpatented rubber plugs and a cartridge holder [Ex. J] for enabling the ultimate user or the tire repair man to quickly reload the empty Fromberg metal shells with rubber plugs of defendant's manufacture.

It is axiomatic that the defendant-appellee cannot contribute to infringement or actively induce infringement unless the act of refilling the empty Fromberg cartridge shell with a new rubber plug is of itself a direct infringement. One cannot actively induce or contribute to a non-existent infringement.

The Supreme Court in restating this fundamental axiom in *Aro Mfg. Co. v. Convertible Top Replacement Co.* (1961), 365 U. S. 336, 341, 81 S. Ct. 599, 5 L. Ed. 2d 592, 596, 597 held:

> ". . . It is admitted that petitioners know that the purchasers intend to use the fabric for replacement purposes on automobile convertible tops which are covered by the claims of respondent's combination patent, and such manufacture and sale

> with that knowledge might well constitute contributory infringement under § 271(c), if, but only if, such a replacement by the purchaser himself would in itself constitute a *direct* infringement under § 271(a), for it is settled that if there is no *direct* infringement of a patent there can be no *contributory* infringement. . . . It is plain that § 271(c)—a part of the Patent Code enacted in 1952—made no change in the fundamental precept that there can be no contributory infringement in the absence of a direct infringement. . . ."

Clearly the resale by defendant-appellee of Fromberg cartridges including the shell and plug as manufactured by the plaintiff-appellant is not an infringement since by the original sale of the patentee the cartridges passed out of the limits of the patent monopoly and might be used or resold by anyone without infringement of the patent.

> *Morgan Envelope Co. v. Albany Perforated Wrapper Paper Co.* (1894), 152 U. S. 425, 432-433, 38 L. Ed. 500, 503.

Also the sale of the rubber repair plug and the cartridge holder does not constitute direct infringement since neither element is separately covered by the patent in suit.

The sole issue is whether or not the reloading of an empty Fromberg metal shell with a new unpatented rubber plug of defendant-appellee's manufacture by the owner or tire repairman constitutes direct infringement.

IV.

The District Court Correctly Held That There Is No Infringement in the Replacement of the Unpatented Rubber Plug in the Fromberg Cartridge.

The District Court found that it was the purpose of the metal cartridge shell when used with an applicator to dispense the rubber plug contained therein into an opening in a tire to repair the same and that in order to re-use the metal shell it was only necessary to place therein another rubber plug. After finding such undisputed facts, the District Court held:

> ". . . There are, no doubt, many cases holding that where the manufacture and sale of a single element of a patented combination with the intent that it shall be used with the other elements and so complete the combination, is an infringement if the use of the added elements constitutes a 'reconstruction' of the original device, but not, if it constitutes only a 'repair.' *Morgan Envelope Company v. Albany Paper Company,* 152 U. S. 425. But as pointed out in the Morgan Envelope case, these cases have no application to one where the element made by the alleged infringer is an article of manufacture, perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically whenever the device is put to use. Although it cannot be said in the instant case that the rubber plug is perishable, it nevertheless has only a temporary use in the patentable combination.

"In *Aro Manufacturing Co. v. Convertible Top Replacement Co.,* 365 U. S. 336, 343, note 9, the Court stated: '*Morgan Envelope Co. v. Albany Paper Co.,* 152 U. S. 425, and *Heyer v. Duplicator Mfg. Co.,* 263 U. S. 100, held that an owner or licensee of a patented machine or combination does not infringe the patent by replacing an unpatented element of the combination which has only a *temporary period of usefulness* (emphasis ours), so that replacement is necessary for continued utilization of the machine or combination as a whole.'

"The plaintiff, having once sold its cartridge, is no longer entitled to the protection of its patent on the device sold, and the defendant, as a purchaser, may therefore without infringement replace, or advise others to replace, an unpatented component thereon with one of defendant's own design and manufacture." [R. 24, 25.]

The *Aro* case quoted from and relied on by the District Court is the most recent and authoritative holding of the Supreme Court of what constitutes a repair or a reconstruction of a patented combination. In the *Aro* case the plaintiff had a patent on the combination of a flexible top fabric, a supporting structure and a wiper mechanism for sealing the fabric against the side of the automobile body to keep out the rain. The defendant made fabric tops especially adapted for use in the patented structure and sold such tops knowing that the purchaser intended to use the fabric as a replacement on automobile convertible tops which were covered by the patent. The patentee urged that the

particular shape of the fabric top was the essence or very heart of the invention, that it was relatively expensive, relatively difficult to replace, that therefore, a new license had to be obtained and another royalty paid to the patentee when the top was replaced. The Court of Appeals for the First Circuit held that the owner of an automobile with the patented top would not rationally believe that the replacement of the expensive, long lasting top fabric (expected life span of three years) was a mere repair and thus that such replacement was a reconstruction and an infringement of the patent. The Supreme Court reversed in holding that:

> "No element, not itself separately patented, that constitutes one of the elements of a combination patent is entitled to patent monopoly, however essential it may be to the patented combination and no matter how costly or difficult replacement may be. While there is language in some lower court opinions indicating that 'repair' or 'reconstruction' depends on a number of factors, it is significant that each of the three cases of this Court, cited for that proposition, holds that a license to use a patented combination includes the right 'to preserve its fitness for use so far as it may be affected by wear or breakage.' Leeds & Catlin Co. v. Victor Talking Mach. Co. 213 US 325, 336, 53 L ed 816, 820, 29 S Ct 503; Heyer v. Duplicator Mfg. Co. supra (263 US at 102); and Wilson v. Simpson, supra (US) 9 How at 123. *We hold that maintenance of the 'use of the whole' of the patented combination through replacement of a spent, unpatented element does not constitute reconstruction.*

"The decisions of this Court require the conclusion that reconstruction of a patented entity, comprised of unpatented elements, is limited to such a true reconstruction of the entity as to 'in fact make a new article,' United States v. Aluminum Co. of America, supra (148 F 2d at 425), after the entity, *viewed as a whole,* has become spent. In order to call the monopoly, conferred by the patent grant, into play for a second time, it must, indeed, be a second creation of the patented entity, as for example, in Cotton-Tie Co. v. Simmons, 106 US 89, 27 L ed 79, 1 S Ct 52, supra. *Mere replacement of individual unpatented parts, one at a time, whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property.* Measured by this test, the replacement of the fabric involved in this case must be characterized as permissible 'repair,' not 'reconstruction.'" (Emphasis added.)

Aro Mfg. Co. v. Convertible Top Replacement Co., supra, 365 U. S. 336, 346, 5 L. Ed. 2d 592, 599.

The Supreme Court thus laid down the simple legal test that there is no reconstruction or infringement by the replacement of a spent unpatented part by an owner of the patented combination.

See the concurring opinion of Justice Black at 365 U. S., p. 361 and the dissenting opinion of Justices Harlan, Frankfurter and Stewart at 365 U. S., p. 375.

This test of permissible repair laid at rest many previous lower Court decisions where reconstruction

had been found on the basis of such factual issues as the importance or cost of the replaced part to the remainder, the ease or difficulty in making the replacement and the patentee's intention as to the use of the patented combination.

In setting out the narrow limits of the doctrine of reconstruction, the Court further stated:

> "This Court's decisions specifically dealing with whether the replacement of an unpatented part, in a patented combination, that has worn out, been broken or *otherwise spent,* is permissible 'repair' or infringing 'reconstruction,' have steadfastly refused to extend the patent monopoly beyond the terms of the grant. Wilson v Simpson (US) 9 How 109, 13 L ed 66—doubtless the leading case in this Court that deals with the distinction—concerned a patented planing machine which included, as elements, certain cutting knives which normally wore out in a few months' use. The purchaser was held to have the right to replace those knives without the patentee's consent. . . . The Court explained that it is 'the use of the whole' of the combination which a purchaser buys, and that repair or replacement of the worn-out, damaged or destroyed part is but an exercise of the right 'to give duration to that which he owns, or has a right to use as a whole.' Ibid.[9]
>
> (Footnote 9) "None of this Court's later decisions dealing with the distinctions between 'repair' and 'reconstruction' have added to the exposition made in Wilson v Simpson (US) supra, and that opinion has long been recognized as the Court's authoritative expression on the subject.

Morgan Envelope Co. v Albany Perforated Wrapping Paper Co.152 US 425, 38 L ed 500, 14 S Ct 627, and Heyer v Duplicator Mfg. Co. 263 US 100, 68 L ed 189, 44 S Ct 31, held that an owner or licensee of a patented machine or combination does not infringe the patent by replacing an unpatented element of the combination which has only a temporary period of usefulness, so that replacement is necessary for continued utilization of the machine or combination as a whole. Those cases came clearly within the Wilson Case. American Cotton-Tie Co. v Simmons, 106 US 89, 27 L ed 79, 1 S Ct 52, the only other repair-reconstruction case decided by this Court since Wilson, *found infringement by one who bought up, as scrap metal,* patented metal straps, used in tying cotton bales, after the straps had been used and severed (in unbinding the bales), and *who then welded or otherwise reconnected the straps at the severed point and resold them for further use in baling cotton.* The case is distinguishable on its facts, and the fact that the *ties were marked 'Licensed to use once only,' was deemed of importance by the Court.* Cf. Henry v A. B. Dick Co. 224 US 1, 56 L. ed 645, 32 S Ct 364, Ann Cas 1913D 880." (Emphasis added.)

Aro Mfg. Co. v. Convertible Top Replacement Co., supra, 365 U. S. 336, 342, 343, 5 L. Ed. 2d 592, 597, 598.

The *Morgan Envelope Co.* case relied on in the *Aro* decision involved a fact situation almost identical to the case at bar, in which the plaintiff obtained a patent for the combination of a roll of toilet paper and

a dispensing mechanism for delivering the paper to the user. The Supreme Court held that there was no infringement or contributory infringement by the defendant in reselling the dispensing mechanism previously purchased from the patent owner and selling rolls of toilet paper for use in dispensing mechanisms previously sold by the patent owner.

In the *Morgan Envelope Co.* case the Court stated the real issue to be:

> "The real question in this case is whether, conceding the combination of the oval roll with the fixture to be a valid combination, the sale of one element of such combination, with the intent that it shall be used with the other element, is an infringement. We are of opinion that it is not. There are doubtless many cases to the effect that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement. Saxe v. Hammond, Holmes, 456; Wallace v. Holmes, 9 Blatchf. 65; Barnes v. Strause, 9 Blatchf. 553; Schneider v. Pountney, 21 Fed. Rep. 399. But we think these cases have no application to one *where the element made by the alleged infringer is an article of manufacture perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically, whenever the device is put to use.* Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee; but if the product be unpatentable, it is giving to the patentee

> of the machine the benefit of a patent upon the product, by requiring such product to be bought of him. To repeat an illustration already put: If a log were an element of a patentable mechanism for sawing such log, it would, upon the construction claimed by the plaintiff, require the purchaser of the sawing device to buy his logs of the patentee of the mechanism, or subject himself to a charge of infringement. This exhibits not only the impossibility of this construction of the patent, but the difficulty of treating the paper as an element of the combination at all. In this view, *the distinction between repair and reconstruction becomes of no value, since the renewal of the paper is in a proper sense neither the one nor the other.*" (Emphasis added.)
>
> *Morgan Envelope Co. v. Albany Perforated Wrapper Paper Co.* (1894), 152 U. S. 425, 432, 433, 14 S. Ct. 627, 38 L. Ed. 500, 503.

In the case at bar the metal shell is used to deliver the rubber repair plugs into tires in the same manner that the dispenser mechanism in the *Morgan Envelope Co.* case was used to deliver toilet paper to the user. There is no infringement of the patent in suit in reloading the emptry Fromberg metal cartridge shells with replacement plugs manufactured and sold by the defendant.

The plaintiff-appellant relies on the hypothetical case of the patented torpedo referred to in the *Morgan Envelope Co.* case in an attempt to show that the reloading the empty Fromberg metal cartridge shells is a reconstruction. The *Morgan Envelope Co.* case

in drawing a parallel to the case of *American Cotton Tie Co. v. Simmons* (1882), 106 U. S. 89, 1 S. Ct. 52, 27 L. Ed. 79, where the bands of the cotton bale ties were severed at the cotton mill, sold as scrap iron and then new bands were made by piecing together pieces of the old band stated:

> "It is evident that the use of the tie was intended to be as complete a destruction as would be the explosion of a patented torpedo. In either case, the repair of the band or the refilling of the shell would be a practical rebuilding of the device."
>
> *Morgan Envelope Co. v. Albany Perforated Wrapper Paper Co., supra,* 152 U. S. 425, 429, 38 L. Ed. 500, 504.

The plaintiff-appellant interprets the Supreme Court's use of the term torpedo to refer to a rifle or other small arm cartridge in which the shell casing would remain reusable after the lead bullet was expelled. A torpedo is a well known submarine projectile and it is difficult to believe that the Supreme Court intended that the term torpedo refer to something other than what it is. A torpedo after explosion would leave the shell in bits and pieces which could be reclaimed and pieced together with other torpedo shell fragments to form a new shell as was done with the scrapped severed bands in the *American Cotton Tie* case. If the Supreme Court had intended to inform the general public that small arm cartridges could not be reloaded by placing a new lead bullet and powder therein without infringing a patent that might exist on the combination, the Supreme Court would not have referred

to a torpedo since it has long been a common practice in this country for gun owners to reload small arm cartridge shells.

The *Heyer v. Duplicator Mfg. Co.* case also relied on in the *Aro* decision involved a patent on a multiple copying machine which included as an element thereof a gelatine band of many feet in length. The gelatine band could be used for making hundreds of copies. The patentee sold the machine outright without attempting to impose any contractural obligations or restrictions on the use of the machine. The patentee contended that the gelatine band was an element of the combination claimed and could not be replaced except with the patentee's consent and that such replacement without his consent was infringement. With this contention the Seventh Circuit agreed; 284 Fed. 242 (1922). The Supreme Court reversed holding that:

> "Since Wilson v. Simpson, 9 How. 109, 123, 13 L. ed. 66, 72, it has been the estabiished law that a patentee has not 'a more equitable right to force the disuse of the machine entirely, on account of the inoperativeness of a part of it, than the purchaser has to repair, who has, in the whole of it, a right of use.' The owner, when he bought one of these machines, had a right to suppose that he was free to maintain it in use, without the further consent of the seller, for more than the sixty days in which the present gelatine might be used up. . . ."
>
> *Heyer v. Duplicator Mfg. Co.* (1923), 263 U. S. 99, 101-102, 44 S. Ct. 31, 68 L. Ed. 189, 190.

The early decision of the Supreme Court in *American Cotton Tie* case upon which the plaintiff-appellant so heavily relies, involved a patent on a cotton bale tie including a buckle with a restrictive notice "Licensed to use once only" and a band of iron. The tie consisting of the buckle and band was purchased by a person desiring to use it to confine cotton in a bale and was placed around the bale at the plantation or at the cotton press. The bale of cotton including the tie was then sold to the cotton mill as a unit at so much per pound for the cotton and tie. The cotton mill owner (not the original purchaser) severed the band to process the cotton and sold the pieces of bands and buckles as scrap iron. The defendant purchased such scrap iron, straightened the old pieces of the bands by cold rolling, formed new bands by welding or riveting several pieces of the old bands together, cut the newly made bands into proper lengths and attached them to an old buckle. The newly made tie was then sold for use to confine new bales of cotton. The Supreme Court held that the remaking of the bands out of scrap metal and combining such bands with the used buckles which were stamped "Licensed to use only once" was an infringement and thus a reconstruction of the patented device.

In the *American Cotton Tie* case the patented combination had been rebuilt *de nova* from the ground up out of the scrap iron sold by the cotton mill owners.

> ". . . (A) sale of scrap is a sale not to use but to destroy, and cannot be wrested into a sale of

the patented machines because the different parts could be picked up and put together out of it."

Green v. Electric Vacuum Cleaner Co. (6th Cir., 1942), 132 F. 2d 312, 314 (citing the *American Cotton Tie* case).

The *American Cotton Tie* case is clearly distinguishable from the case at bar on its facts. In the first place, defendant-appellee does not purchase scrap cartridge shells and reload them. In the case at bar the purchaser of the patented combination, the tire repairman, keeps the empty metal shells and reloads the shells himself. In the second place, the metal cartridge shells in the case at bar are not rewelded or rebuilt to make a new shell but are reloaded in their original form. There is no rebuilding of the patented invention *de novo* from the ground up as there was in the *American Cotton Tie* case.

In one other material respect, the present case differs from the *American Cotton Tie* case, and that is the restrictive notice "Licensed to use only once" which was stamped on the buckles in the *American Cotton Tie* case. The purchasers of the buckles received the buckles subject to the limited license contained in the notice, that is, to have the buckle and band confine a bale for one time only and not for a longer time. In the case at bar, the patented tire repair cartridges are purchased without any restrictive notice and pass into the market place as ordinary articles of commerce free and clear of the patent monopoly.

Henry v. A. B. Dick Co. (1912), 224 U. S. 1, 37, 32 S. Ct. 364, 56 L. Ed. 645, 659;

Motion Picture Patents Co. v. Universal Film Mfg. Co. (1917), 243 U. S. 502, 37 S. Ct. 416, 61 L. Ed. 871;

United States v. Univis Lens Co. (1942), 316 U. S. 241, 62 S. Ct. 1088, 86 L. Ed. 1408.

The restrictive license notice stamped on the buckles in the *American Cotton Tie* case was deemed of importance by the Court in finding infringement or reconstruction as was stated by the majority opinion in the *Aro* case wherein the Court stated:

> "The (Cotton Tie) case is distinguishable on its facts, and the fact that the ties were marked 'Licensed to use once only,' was deemed of importance by the Court. Cf. Henry v. A. B. Dick Co. 224 US 1, 56 L.Ed 645, 32 S. Ct. 364, Ann Cas 1913 D 880." (Parenthesis added.)
>
> *Aro Mfg. Co. v. Convertible Top Replacement Co., supra,* 365 U. S. 336, 349, 5 L. Ed. 2d 592, 597. (Footnote 9.)

V.

The Intention of the Patentee as to How the Patented Device Is to Be Used Is Not a Proper Test for Infringement.

The plaintiff-appellant places great reliance upon the contention that the patentee's intention of how the tire repairman is to use the patented tire repair cartridge is determinative of the question of infringement. This test is clearly unrealistic and not supported by the law. In the concurring opinion of Justice Black in the *Aro* case it is stated:

> ". . . Deciding whether a patented article is 'made' (or reconstructed) does not depend on

whether an unpatented element of it is perishable, or how long some of the elements last, or what the patentee's or a purchaser's intentions were about them, . . ." 365 U. S., p. 354, 56 L. Ed. 2d, p. 604. (Parenthesis added.)

* * *

". . . And surely the scope of a patent should never depend upon a psychoanalysis of the patentee's or purchaser's intentions, a test which can only confound confusion. The common sense of the whole matter is, as recognized in the Wilson Case and again in the opinion of the Court today, that in none but the most extraordinary case—difficult even to imagine—will a court ever have to invoke specially contrived evidentiary standards to determine whether there has actually been a new 'making' of the patented article." 365 U. S., p. 355, 5 L. Ed. 2d 604, 605.

* * *

". . . Congress surely did not intend for it to be left within the sole discretion of the patent monopolist whether an unpatented component part will be separately available to the purchaser for replacement in the combination or whether, when that part wears out, the purchaser will be forced to replace a larger subcombination of the patented product or perhaps even the entire aggregation. . . ." 365 U. S., p. 360, 5 L. Ed. 2d 607.

Clearly, if the intention of the patentee were controlling as to the use of the patented invention after the patented invention had been sold the patent monopoly would be expanded many fold. In the *Aro* case

the patentee did not intend that the top fabric when worn out should be replaced without his consent. The test of the majority opinion in the *Aro* case is simply that the same part or different parts of a patented invention may be replaced from time to time by the owner without infringement regardless of the patentee's wishes or intentions. That is all that has occurred in the case at bar.

In *Micromatic Hone Corp. v. Mid-West Abrasive Co.* (6th Cir., 1949), 177 F. 2d 934, 937, the Court expressly rejected the argument that the patentee's intention in the design of an unpatented component so that it was cheaper to throw the component away than refill it with the perishable component was relevant in determining infringement or repair in stating:

> ". . . It also seems clear to us that while its low cost of manufacture warranted a purchaser in throwing it away after the initial stone was worn down, rather than returning it for a refill when the purchaser did not care to be bothered with such details, nevertheless, the metal stone holder was not expended or destroyed, but on the contrary, had a continued useful life and was available to the purchaser of it for refilling if he desired to do so rather than to throw it away . . .".

The plaintiff-appellant relies on the Fifth Circuit decision of *Fromberg, Inc. v. Thornhill* (5th Cir., 1963), 315 F. 2d 407 as precedent for the "intention" test. In this case the Fifth Circuit held that the replacing of a rubber plug in the cartridge shell previously sold by the plaintiff-appellant, Fromberg, Inc., was a reconstruction and thus an infringement. In

arriving at this conclusion, the Court completely misconstrued the simple test laid down in the *Aro* case. Instead of applying the test set forth in the *Aro* decision, to wit:

> ". . . In order to call the monopoly, conferred by the patent grant, into play for a second time, it must, indeed, be a second creation of the patented entity, as for example, in Cotton-Tie Co. v. Simmons, 106 US 89, 27 L.ed 79, 1 S Ct. 52, supra. (Reclamation of scrapped parts.) Mere replacement of individual unpatented parts, one at a time, whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property. . . ." (Parenthesis added.)
>
> *Aro Mfg. Co. v. Convertible Top Replacement Co., supra,* 365 U. S. 336, 346, 5 L. Ed. 2d 592, 599.

The Fifth Circuit applied the test of "whether when sold by the patentee, it is reasonably contemplated that the device will be repeatedly used. . . ." *Fromberg, Inc. v. Thornhill, supra,* 315 F. 2d 407, 412. Using this vague and unrealistic test, the Fifth Circuit concluded that the Fromberg metal shell has a single shot function and purpose for a one-time use and therefore was licensed for one use only even though no such notice restriction appeared on the patented combination to advise the public of the patentee's intention. This test would permit the patentee to determine when a purchaser is required to replace the entire com-

bination instead of only one unpatented element thereof without even notifying such a purchaser of this fact. What is to prevent the patentee from changing his mind as to how the patented device is to be used? What test should be applied to the purchaser that buys Fromberg cartridges for the purpose of reloading the shells with rubber plugs purchased on the open market? Is a statistical survey of the intention of the thousands or millions of buyers necessary to determine whether the replacement of an unpatented rubber plug is a reconstruction or a permissible repair? Should the scope of the patent depend upon a psychoanalysis of the patentee's or purchaser's intentions?

After determining that the Fromberg tire repair cartridge had a contemplated purpose of one use only even though the metal shell is capable of inserting many tire repair plugs into a tire, the Fifth Circuit stated that such facts bring the case precisely within the *American Cotton Tie* case. In arriving at this conclusion, the Court completely overlooked the determinative facts in the *American Cotton Tie* case, that is; (1) the remaking of the patented invention out of scrap parts; and (2) the fact that the buckles were stamped with the restrictive license notice that they could be used only once. The Court in the *Fromberg* case even went so far as to hold that:

> ". . . Of course little reliance can be placed on the fact that the metal ties (in the Cotton Tie case) bore the legend 'Licensed to use once only.'" (Parenthesis added.)
>
> *Fromberg, Inc. v. Thornhill, supra,* 315 F. 2d 407, 413, Footnote 15.

This statement by the Fifth Circuit is in direct contradiction to the majority opinion in the *Aro* case wherein the Court stated:

> ". . . the fact that the ties were marked 'Licensed to use once only' was deemed of importance by the Court. . . ."
>
> *Aro Mfg. Co. v. Convertible Top Replacement Co., supra,* 365 U. S. 336, 343, 5 L. Ed. 2d 592, 598, Footnote 9.

The Fifth Circuit while recognizing the simple test of reconstruction as established in the *Aro* case ". . . does this really make a device? . . ." failed to apply it. *Fromberg v. Thornhill, supra,* 315 F. 2d 407, 412. Does the replacement of the cylindrical rubber plug in the Fromberg metal shell [Exs. A, B, C or D] make a new device when the replacement of the expensive, durable top fabric which was the very heart of the extremely successful Mackie-Dulck invention does not make a new device?

It is respectfully submitted that the Fifth Circuit decision in *Fromberg, Inc. v. Thornhill, supra,* applied the wrong legal test in finding that the reloading of a Fromberg shell with a new unpatented rubber plug by the tire repairman was a reconstruction of the patented combination instead of a permissible replacement of an unpatented element having only a temporary period of usefulness as set forth by the Supreme Court in the *Aro* and *Morgan Envelope Co.* cases.

No. 18540

In the

United States Court of Appeals

For the Ninth Circuit

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Appellant,

vs.

RALPH SCHIEWE, BETTE SCHIEWE, his wife,
and JANICE NECHANICKY,
Appellees.

RALPH SCHIEWE and JANICE NECHANICKY,
Cross-Appellants,

vs.

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Cross-Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon
HONORABLE JOHN F. KILKENNY, Judge

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APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon
HONORABLE JOHN F. KILKENNY, Judge

JURISDICTION

This is an action for personal injuries sustained in an airplane accident. It was brought in the District Court for Oregon. Plaintiffs-appellees are citizens and residents of Washington. Defendant-appellant is a citizen and resident of Oregon, and the matter in controversy between each of the plaintiffs and defendant exceeds $10,000 exclusive of interest and costs (R 15).

The case was tried by a jury commencing November 27, 1962 and on November 29, 1962 verdicts were returned and judgment was entered in favor of plaintiffs and against defendant as follows: (1) for plaintiff Ralph Schiewe in the amount of $1,200; (2) for plaintiff Janice Nechanicky in the amount of $2,000; and (3) for plaintiff Bette Schiewe in the amount of $12,000 (R 26-30). On December 19, 1962, defendant's motion for judgment notwithstanding the verdict and the motions of plaintiffs Ralph Schiewe and Janice Nechanicky for a new trial limited to the issue of damages were denied (R 38-39).

On January 14, 1963 defendant appealed from the judgment of November 29, 1962 (R 40). On January 16, 1963 plaintiffs Ralph Schiewe and Janice Nechanicky cross-appealed from said judgment and from the order denying their motion for a new trial (R 59).

The District Court had jurisdiction under 28 USC § 1332 as amended. This Court has jurisdiction under 28 USC § 1291 as amended.

STATEMENT OF THE CASE

This is an action for personal injuries received by plaintiffs on August 14, 1959 when defendant's single-engine Piper Comanche airplane, in which they were guest passengers, crashed at Kingsley Field, Klamath

Falls, Oregon (R 15). Plaintiffs originally contended that defendant was demonstrating the plane to them as prospective purchasers (R 16). This contention was withdrawn at the trial, and plaintiffs proceeded "strictly on the basis of gross negligence and reckless disregard of the rights of others" (Tr 2).

ORS 30.120, which was in force at the time of the accident, provided:

> "No person transported by the owner or operator of aircraft as his guest without payment for such transportation shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication or his reckless disregard of the rights of others."[1]

The trial judge submitted specifications of gross negligence and reckless disregard of the rights of others as follows:

Fuel supply in the left tank.

"3. In operating and flying said airplane without sufficient gasoline in the left fuel tank.

"4. In failing to properly determine the amount of gasoline in the left fuel tank.

"5. In attempting to check the amount of gaso-

1. The Oregon Motor Vehicle Guest Passenger Statute (ORS 30.110) was identical. In 1961 the two statutes were amended and combined (Oregon Laws 1961, Ch 578, codified as ORS 30.115).

line in the left fuel tank without the aid of lights or a measuring device."

Defendant's conduct when the engine failed.

"9. In failing to switch from the left fuel tank to the right fuel tank when the engine failed or commenced to fail.

"10. In failing to lower the nose of said airplane when the engine failed or commenced to fail.

"11. In failing to maintain a straight glide path.

"12. In attempting to turn said airplane to the left at a time when the engine thereof had failed or had commenced to fail." (R 16, 17; Tr 316-317)

The trial judge reserved ruling on defendant's motion for a directed verdict at the end of plaintiffs' case (Tr 240-241) and denied defendant's motion for a directed verdict at the close of all the evidence (Tr 301-303).

On November 30, 1962 defendant moved for judgment notwithstanding the verdict (R 31-32), which was denied on December 19, 1962 (R 38-39).

QUESTIONS PRESENTED

1. Was there any evidence that defendant was guilty of gross negligence or wilful disregard for the rights of plaintiff, within the meaning of the Oregon

Aircraft Guest Passenger Statute, which was a proximate cause of the accident?

2. Was there any evidence that there was insufficient gasoline in the left fuel tank when the plane took off ?

SPECIFICATIONS OF ERROR

1. The trial court erred in failing to allow defendant's motion at the close of plaintiffs' case for a directed verdict in his favor and against each plaintiff on the grounds that there was no evidence that defendant was guilty of gross negligence or wilful disregard of the rights of any of the plaintiffs, or that any act or omission on his part constituted a proximate cause of the accident (Tr 240-241).

2. The trial court erred in denying defendant's motion at the close of all the evidence for a directed verdict on the ground that there was no evidence that defendant was guilty of gross negligence and alleged disregard of the rights of others in any particular charged or that any such act on his part constituted a proximate cause of the accident (Tr 301-302).

3. The trial court erred in denying defendant's motion for judgment notwithstanding the verdict on the grounds previously asserted in support of the motions for a directed verdict (Tr 352-354; R 31-32, 38-39).

SUMMARY OF ARGUMENT

I.

Defendant was entitled to a directed verdict against each plaintiff, because there was no evidence that defendant was guilty of gross negligence or wilful disregard for the rights of plaintiffs under Oregon law.

a. There was no evidence that defendant was guilty of such negligence in making a visual inspection of the gasoline in the left fuel tank prior to taking off.

b. There was no evidence that defendant was guilty of such negligence in operating the plane when the engine died after taking off.

II.

There was no evidence that there was insufficient gasoline in the left fuel tank when the plane took off.

ARGUMENT

The Evidence

Plaintiff Ralph Schiewe and defendant were both pilots. Defendant had been flying for 20 years and sold and serviced airplanes in the course of his business. Ralph Schiewe had flown with him before (Tr 10-11; 14, 43, 55).[2]

2. Ralph Schiewe's license had expired in 1949, because he did not fly enough (Tr 11) and had not taken the necessary physical examinations (Tr 54-55).

On the day of the accident, Mr. Schiewe, his wife Bette Schiewe (defendant's niece), and Mr. Schiewe's half-sister, Janice Nechanicky (Tr 65, 115), together with one Bruce Nelson, drove from Hermiston, Oregon to Klamath Falls, Oregon, arriving about 4 p.m. Defendant and his wife invited them to stay for dinner (Tr 11-13, 67-69). During dinner, defendant suggested that they take a ride in his new Piper Comanche airplane after dinner (Tr 13-14, 69).

Sunset occurred on that day at 7:09 p.m. (Exh 8). The party arrived at the airport between 7:15 and 7:30, as it was getting dusk (Tr 15; see Tr 70, 117, 280, 286). Weather conditions were as follows: Sky clear, visibility 20 miles, temperature 71, dew point 44, wind northwest 10 (Exh 7; Tr 153). They wheeled the airplane in front of the hangar, where defendant "did his check of the airplane" (Tr 15, 273, 286) according to the check list in the plane (Tr 57). There was still sufficient light to cast a shadow, and the plane was in the shadow of the hangar (Tr 16, 44-45). The runway lights were on (Tr 16).

Defendant gave the plane a line inspection, which consisted of visually looking over the entire plane, opening up the cowling, checking the oil level, the flaps, and visually checking the engine and the fuel. The warm up was normal (Tr 20, 49, 57, 273-274; see Tr

277-278; see Exh 5, pp 21-23). He checked the "control surfaces to see that they were in good condition, and he walked around and visually checked the left tank" (Tr 16, 45) by opening the outer door on the wing and the inner cap and visually looking into the left fuel tank (Tr 17, 148, 274). After doing so, he told Mr. Schiewe that the tank was full (Tr 57). Defendant testified that he could see and that the tank was full to the bottom of the tube or spout of the tank[3] (Tr 274, 275-276, 288, 289, 293). The gauge indicated that the tank was ¾ full (Tr 48-49, 154, 275). Defendant did not use a flashlight or measure the gasoline with a stick or his finger (Tr 17, 148), but depended on the light still available in the area (Tr 148).

Plaintiff Ralph Schiewe testified that in addition to a visual inspection, it is customary to measure the fuel with a stick or one's finger (Tr 19). Defendant denied that there is such a custom (Tr 275).

Mr. Vincent Dupea, a commercial pilot (Tr 219), testified that it is customary to check the gasoline "visually" (Tr 220-221). In the case of a Piper Comanche, one can determine by a visual inspection whether the gasoline is up to the bottom of the tube (Tr 226).[4] At

3. The fuel tank holds 30 gallons. When the fuel is at the bottom of the tube, it is 4/5 full, and 25 gallons remain in the tank (Tr 289; Exh 4-E).
4. In some planes one has to use a stick or his finger "or being able to determine that it has enough fuel by looking at it" (Tr 221).

dusk, however, it is better to have a flashlight or make a finger test (Tr 227-228).

Allen Withers, an airline transport pilot (Tr 249-250), testified that it is the custom and practice to determine the gasoline level by visual inspection and that it is not the custom and practice to use a stick to measure the fuel level (Tr 252-253). Even under less than normal visibility conditions, a visual inspection might still be satisfactory (Tr 253). However, if it is dark or dusk, one should use a flashlight or his finger (Tr 253-254).

Earl Kent, a flying student who has a private pilot's license (Tr 258), testified that it is customary to make a visual check of the gasoline and the gauge, but not to use a finger; if there were doubt, however, he would use his finger or a flashlight (Tr 259, 261, 262).

Exhibit 5 (the owner's manual) contains a roster of things to check prior to flight and a ground check schedule of precautions to take prior to takeoff (pp 21-23), including the following:

> "Before each flight, visually inspect the plane and/or determine that: '* * * (10) the fuel tanks are full or are at a safe level of proper fuel.' "

When the FAA inspector, Mr. Christenson (Tr 132), inspected the plane at 8 a.m. the next day

(Tr 155), there was gasoline in the right tank, which the fuel gauge showed was ½ full (Tr 143; Exh 7; see Tr 154).

After defendant completed his inspection, the party boarded the plane. At defendant's suggestion, he and Mr. Schiewe sat in the front seats, Mr. Schiewe on the left side and defendant on the right side.[5] Mrs. Schiewe and Miss Nechanicky sat in the rear seats (Tr 20, 22, 71, 278-279). The fuel selector valve was on the left fuel tank (Tr 22, 49, 57, 103-104, 154, 204), and the gauge for that tank showed that it was ¾ full (Tr 48-49, 154, 275, 276). When Mr. Schiewe commented that the left fuel gauge did not show full, defendant said that it did not work properly and "always" showed ¾ full (Tr 22-23, 118, 126).[6]

Defendant received clearance at 7:41 and taxied the plane to preflight position. Along the way, he waited for a larger plane to pass by and moved aside for it (Tr 24, 71-72, 118, 275, 278; Exh 7). Defendant then made a preflight check of all of the controls and instruments, including running up the engine (Tr 24-25, 72, 278). Everything operated properly, and defendant received

5. This was a dual control plane (Tr 23), which can be flown equally well from either side (Tr 47, 48, 226, 278). These positions were the customary ones in case of flight instruction (Tr 47, 56), although at other times the pilot normally sits on the left (Tr 20, 21, 48, 221, 228). On prior occasions when he flew with defendant, Mr. Schiewe sat on the left (Tr 55). Generally, the pilot chooses where he wants to sit (Tr 226).

6. Defendant denied making this statement, and testified that he actually said that the gauge is set to read ¾ full when the tank is full to the bottom of the tube (Tr 275).

permission from the tower to take off at 7:51 (Tr 24, 118, 149, 278; Exh 7).

The takeoff was normal (Tr 25-26, 72, 278), and the landing gear was retracted (Tr 25, 141, 279). However, as the plane reached a speed of 95 miles per hour and an altitude of 75-80 feet, the engine commenced to sputter and lose power (Tr 26, 57-58, 72, 100, 118-119, 149, 198-200, 279). It sounded as if there were no gasoline in the engine (Tr 28, 50, 72). Several seconds later, it quit completely (Tr 26, 72, 101, 199-200).

When the engine commenced to fail, defendant pushed the mixture to full range and the propeller to maximum rpm, and pumped the throttle (Tr 26, 73, 149, 279, 292, 293). He became upset and excited and cried out "Oh, my God, the engine stopped"; "What's wrong, what's happening"; and "What's the matter with this thing" (Tr 51, 73, 119). Defendant was sure there was gasoline in the left tank (Tr 293) and did not switch the gas selector to the right tank (Tr 26, 149, 293). He was not inactive, but was trying to get the engine started (Tr 51-52).

Defendant did not lower the nose of the plane (Tr 26-27, 100-101, 201), which commenced to lose speed (Tr 101). He then attempted a left turn, and at about 25 feet the plane stalled and dropped to the ground (Tr 27, 72-73, 101, 150, 201, 280, 295).

Defendant lost sight of the horizon and the runway lights and turned the plane in an effort to find them. He could not tell whether the nose was up or down or where the ground was, although he knew he was losing altitude (Tr 280-281, 293-294, 295). If he had known where the runway and horizon were, he could have turned the nose down and glided in (Tr 294-295). He thought the engine would start again and that it might have stopped due to a piece of dirt in the carburetor (Tr 296).

There was evidence that in such an emergency, the proper practice is to lower the nose and maintain a straight line of flight to preserve air speed and that the fuel selector should be switched to the right tank (Tr 28, 29-30, 60-61, 222-225). However, this was an emergency situation, and a pilot never knows what he will do in an emergency (Tr 51, 227).

There are numerous possible causes of engine failure in single-engine planes, including blockages of the fuel lines or the air intake (Tr 50-51).

When defendant's employees, Mr. McNeal (Tr 197) and Mr. Burton (Tr 98), examined the left fuel tank 10-15 minutes after the accident, it had little or no gasoline in it. However, gasoline was still leaking from the left wing onto the ground and had formed a wet area

of 6 x 18 inches on the dry, porous soil (Tr 104, 105, 113, 204-205, 206; see Tr 145).

The plane was examined at 8:00 a.m. the next morning by Mr. Christenson, an FAA inspector (Tr 132, 140) and later by Mr. McNeal, after the cowling had been removed (Tr 209-210).

a. Mr. McNeal found very little gasoline in the carburetor, which meant that fuel was not reaching it (Tr 210-211).[7]

b. There was a tear in the bottom of the left fuel tank which looked like recent or fresh damage. The tank was empty. The damaged part of the tank rested on the edge of a broken part of the wing structure (Tr 144-145, 212-214; see also Exh 7, p 2).

c. No defect was found in the fuel pump or other mechanical failure which might have kept gasoline from entering the carburetor (Tr 142-143; Exh 7, p 2; Tr 150, 212, 216). The plane had been in good condition prior to the accident (Tr 114, 216, 286).

During the FAA examination, the examiner found that

7. Mr. Christenson testified that he could not check the fuel system, because the lower portion of the engine compartment was badly damaged, including the carburetor and fuel lines, nor could he determine if there had been any malfunction of the fuel system or carburetor (Tr 155-156). A later test showed that the fuel pump and flow from the right tank were satisfactory (Tr 142-143). Apparently, no test was made of the left fuel lines. Mr. McNeal, on the other hand, testified that the carburetor was in good condition and the fuel lines were undamaged (Tr 211, 212).

> "The fuel gauges operated normally showing the left tank empty and the right tank about half full." (Exh 7, p 2)

The FAA did not, however, check the gauge after the accident by filling the left tank (Tr 144).

Mr. Withers testified that the fuel gauges were operating properly, as were all the other instruments, prior to the accident (Tr 252).

Mr. McNeal believed that the plane ran out of gasoline (Tr 60, 109, 205, 217), but defendant at all times denied it (Tr 114, 218, 282, see also Tr 63).

On August 10 (four days before the accident) defendant returned from British Columbia, following which 36 gallons of gasoline were put in the plane's tanks (Tr 266; Exh 7, p 2; Ex 8-A, p 4). It was flown for an hour and 15 minutes on August 11 and twice more for a total of two hours and 45 minutes on August 12. Twenty-six gallons of gasoline were put in on the evening of August 12, filling both tanks. It was flown once on the 13th for an hour and 10 minutes and was not flown again prior to the accident (Tr 251-252, 260, 265-266, 268, 272-273; Ex 7, p 2; Exh 8-A, p 4; Exh 8-B; Exh 8-C).[8] The tanks were full when it was flown on the 13th (Tr 260).

8. These flights were all made by Mr. Withers and Mr. Kent, except for one by Mr. Rychman (Tr 272). It is unlikely that short flights were made which were not logged (Tr 255).

The plane's specifications state that "fuel consumption (gal. per hr., 75% power)" is 10 to 14 gallons per hour (Exh 5; see also Exh 9).

1. There was no evidence that defendant was guilty of gross negligence or a wilful disregard of plaintiffs' rights.

The trial judge held that there was evidence that defendant was guilty of gross negligence or a reckless disregard of plaintiffs' rights in making an inadequate inspection of the left fuel tank before taking off and in his operation of the plane when the engine failed. In doing so, he misconceived and failed to apply the controlling standards of Oregon law.[9]

A.

In 1960 the Oregon Supreme Court closely examined and redefined gross negligence in a series of cases under the automobile statute which were argued in the spring of that year. The opinion of Justice O'Connell in *Williamson v. McKenna*, (1960) (in department) 223 Or 366, 354 P2d 56 is the leading statement of the Oregon rule and has since been adopted and consistently

9. See *Braughton v. United Air Lines, Inc.*, (DC Mo 1960) 189 F Supp 137 at 145:

"The question of what constitutes gross negligence in the air has not been decided by the Arizona Courts. However, no reason presently appears why the courts of that state would not apply the ordinary rules of the common law to the fact situations and relationships created by aircraft as they would to carriers of passengers on land. * * *"

See Anno: 12 ALR 2d 656 (1950). As pointed out above, the airplane and automobile statutes are identical (supra 3).

followed by the entire court.[10] *Williamson* concerned an accident which occurred when a driver turned into the left arm of a highway "Y" without looking at all for approaching traffic. The court held that there was no evidence of gross negligence, and in terms dispositive of both aspects of this case, analyzed the question as follows:

1. Reckless, wilful or wanton conduct is a category of fault distinct from negligence in that

> "* * * it involves a mental state in which the actor intentionally does an act with knowledge (sometimes implied) that there is a strong probability that serious harm will be inflicted on another. It is distinguishable from intentional conduct on the ground that the latter requires an intent to inflict the harm, whereas reckless conduct involves only an act done with indifference as to whether harm will or will not result." (at 372-373)

2. The standard is an objective one, and if a reasonable man would appreciate an extreme risk of probable injury, conduct can amount to gross negligence (at 373, 397).[11]

---

10. The contrary views of Justice Warner (now retired) and Justice Sloan are set forth in their dissents in *Burghardt v. Olson*, (1960) 223 Or 155 at 210-223, 223-234, 349 P2d 792, 354 P2d 871.

11. This was qualified in *Burghardt v. Olson*, *supra*, (1960) 223 Or 155 at 179, 349 P2d 792, 354 P2d 871:

> "The full consciousness that a risk is to be encountered will not result in reckless conduct if the probability of harm is slight, or if the probability is great but the harm which will probably result is not serious. This can be illustrated by reference to the facts in the present case.
>
> "There is no difficulty in finding that defendant was conscious of a

3. "Gross negligence" is synonymous with "wilful and wanton misconduct", and the latter must be proved for recovery under the guest statute. The distinguishing feature of such conduct is

> "* * * the defendant's mental state—the fault that is associated with a consciousness of danger and an election to encounter it. Gross negligence thus becomes identical with recklessness." (at 388; see 391-392)

4. *The standard is defined by the court, not the jury* (at 392).[12]

5.

> "*The defendant's conduct must involve a high degree of probability that harm will result.* The probability that harm will result from conduct is but another way of saying that the conduct is dangerous. Conduct is not reckless unless the probability that harm will result is strong. The conduct must 'contain a risk of harm to others in excess of that necessary to make the conduct unreasonable and therefore, negligence.' 2 Restatement, Torts, § 500, comment a. * * * The strong probability that harm will result is, of course, the probability which is or

---

risk when she approached the curve. From her previous use of the particular highway she knew that the curve was there, its character and the speed indicated by the highway sign as the safe speed to negotiate the curve. The ingredient which is lacking is the *high degree of probability* that serious harm would result. * * *" (emphasis in the original) See also: *Nielsen v. Brown*, (1962) 75 Or Adv Sh 161 at 187, — Or —, 374 P2d 896 (left hand turn at 90 miles per hour; jury could find recklessness); *Taylor v. Lawrence*, (1961) 229 Or 259, 366 P2d 735 (highly dangerous knife game).

12. This was the principal dispute in *Burghardt v. Olson*, supra, (1960) 223 Or 155 at 182, 209, 349 P2d 792, 354 P2d 871 (concurring opinion of O'Connell, J.).

should be apparent to the defendant. The conduct 'must involve an easily perceptible danger of substantial bodily harm or death and the chance that it will so result must be great.' 2 Restatement, Torts, § 500, comment a. This principle has been stated and applied in numerous cases. * * *" (at 396)

6.

"*Inadvertent conduct, without more, will not constitute recklessness.* Ordinarily, one who, through momentary thoughtlessness, relaxes his vigilance for the safety of others is not grossly negligent. * * *" (at 399)

7. A series or combination of negligent acts may constitute reckless conduct only if, taken together, they evidence a reckless state of mind.

"* * * it is only when all of these acts combined with the existing circumstances show a foolhardy attitude on the part of the driver that gross negligence has been established. * * *"[13]

The court concluded:

"* * * the defendant's conduct did not involve a high degree of probability that harm would result. Certainly, every intersection is a potential area of danger for those who move into it. But before the movement can be regarded as reckless *there must*

13. Quoting from *Gonzalez v. Curtis,* (1959) 217 Or 561 at 564, 339 P2d 713.

be evidence of facts which were known to the defendant or so obvious that they would have been recognized by a reasonable person as involving a high probability of harm if the movement was continued. The evidence does not show such conduct here. * * *" (at 404; emphasis supplied)

In *Morris v. Williams*, (1960) (in banc) 223 Or 50 at 59, 353 P2d 865 (decided two weeks later) the court considered the case of a driver who was driving rapidly through the rain at night and ran into a concrete pillar when he was blinded by the lights of an approaching car. The court applied the *Williamson* rule:

"We think that the defendant was confronted with a sudden development resembling an emergency, and in trying to solve it failed; but we do not think that his efforts can be deemed recklessness or gross negligence as those terms are dealt with in the Williamson decision. If it could be said that defendant may have been guilty of some negligence prior to the moment when he came to the scene of the accident it must be remembered that the charge against him is not that of ordinary negligence but of recklessness and gross negligence. *The category of 'Inadvertent conduct, without more, will not constitute recklessness' includes action taken in an emergency.* We know of no basis for believing that the defendant, as he drove along displayed an I-don't-care attitude."[14] (emphasis supplied)

4. Note that prior ordinary negligence does not render the emergency doctrine inapplicable when the charge is that defendant was guilty of gross negligence in the emergency.

Succeeding cases have consistently applied these rules.[15]

B.

The present record contains no evidence of gross negligence.

Defendant's preflight fuel check

1. Assuming, which appellant denies, that the left fuel tank was nearly empty when he examined it, there was no evidence at all that defendant knew and did not care about it, or that he knew anything indicating that it was or might be empty, or that he knowingly exposed his passengers to any risk at all. The record shows, without contradiction, that he took every customary precaution to check out the plane prior to flight, including a visual inspection of the fuel level in

15. *Holman v. Barksdale*, (1960) 223 Or 452, 354 P2d 798 (speed when entering curve); *McNabb v. DeLaunay*, (1960) 223 Or 468 at 472, 354 P2d 290 (failure to see flagman "amounts to defective lookout coupled with poor judgment. Poor judgment, viewed from hindsight, is not enough to constitute gross negligence"); *Secanti v. Jones*, (1960) 223 Or 598, 349 P2d 274, 355 P2d 601 (opinion by Justice Sloan withdrawn and dissenting opinion of Chief Justice McAllister adopted on rehearing; defendant ran stop sign after passing through four intersections without braking; *Held*, insufficient evidence of a combination of negligent acts constituting gross negligence.

> "'* * * '* * * it is only when all of these acts combined with the existing circumstances show a foolhardy attitude on the part of the driver that gross negligence has been established.'" (at 611))

Bradfield v. Kammerrer, (1960) 225 Or 112, 357 P2d 278 (excessive speed and failure to keep lookout for pedestrian wearing a white coat); *Bland v. Williams*, (1960) 225 Or 193, 357 P2d 258 (driving at high speed through fog, car ran off the road while driver attempted to adjust radio; *Held:* momentary inadvertence); *Stites v. Morgan*, (1961) 229 Or 116, 366 P2d 324 (inadvertence); cf *Rossman v. Foreman*, (1960) 224 Or 610, 356 P2d 430; *Nielson v. Brown*, supra, (1962) 75 Or Adv Sh 161 at 187, — Or —, 374 P2d 896; *Taylor v. Lawrence*, *supra*, (1961) 229 Or 259, 366 P2d 735 (objective standard applied); see, generally, 1 Willamette Law Journal (1961) 425 at 439-443; 40 OLR (1961) 278 at 278-283; 41 OLR (1962) 217 at 225.

the left tank. When he inspected the tank he saw (or, in plaintiffs' view, thought he saw) that it was full to the bottom of the tube. There was no testimony and no evidence that the approaching darkness prevented him from actually seeing the gasoline, or, which is more important, from thinking reasonably and in good faith that he saw it and that his inspection was adequate. *Not one witness testified that it was too dark to see.* In short, the record shows an attitude of concern, not indifference, to the fuel supply, and specific measures taken by defendant to determine its adequacy.

2. Defendant made a thorough ground check of the plane and preflight check before taking off. His visual inspection of the fuel supply was only one of many precautionary measures which he took. His conduct demonstrates a continuing concern for the safety of his passengers and is utterly inconsistent with a finding that he appreciated a serious risk of probable injury and knowingly chose to expose them to it. It is (and must be) plaintiffs' case that defendant was an insurer of the fuel supply under the guest statute. It is doubtful on this record if there was any evidence of negligence at all, much less recklessness.

3. Equally important, there were no facts known to defendant showing a high probability of harm. The plane had scarcely been flown since its tanks were last

filled with gasoline, and it was in top operating condition. This the defendant must have known. There was no reason whatever to anticipate an insufficient fuel supply and there is no suggestion in this record that defendant took chances with a known danger. In short, none of the elements of gross negligence, as defined by the Oregon Supreme Court, was present. The question was one for judicial definition, not a general submission to a jury, and the trial judge erred in failing to hold that there was no evidence of gross negligence.

4. Analogous cases in automobile law are those in which gross negligence is charged on the basis of an owner's failure to inspect for defects. Under the guest statutes, however, the host is under no duty to inspect. The basis of liability is not what he should know, but only what he actually knows and fails to tell his guest. Thus, in the leading case of *Clark v. Parker*, (1933) 161 Va 480, 171 SE 600 at 601 the driver had been told that his brakes were bad. He did not believe it and therefore failed to tell his guest. The court said:

> "If Parker thought that his car was in good condition and had no reason to believe that it was not, that was enough."

See, also, *In re Smoke's Estate*, (1953) 157 Neb 152, 59 NW2d 184 at 190-191 (defective steering apparatus);

Gifford v. Dice, (1934) 269 Mich 293, 257 NW 830 (worn tire: "The owner * * * is only required to provide his guest with the conveyance he provides for himself"); *Olson v. Buskey*, (1945) 220 Minn 155, 19 NW2d 57 at 59 (steering apparatus; no guest statute); *Higgins v. Mason*, (1930) 255 NY 104, 174 NE 77 at 79 (metal bolt missing; no guest statute).[16]

The Oregon cases are in accord. In *Smith v. Williams*, (1947) 180 Or 626 at 643, 178 P2d 710 the court held that a jury could find gross negligence if the defendant knew that he was about to fall asleep and continued to drive. In *George v. Stanfield*, (DC Ida 1940) 33 F Supp 486 actual knowledge of the car's bad brakes and excessive speed around curves made a submissible case. In *Johnston v. Leach*, (1953) 197 Or 430, 253 P2d 642 there was held to be a submissible question of gross negligence when it appeared that the defendant, who knew his tires were smooth, drove on slick pavement at an excessive speed over the protests of his guest.

In *Navarra v. Jones*, (1946) 178 Or 683, 169 P2d 584 the evidence disclosed that the defendant examined the car two weeks before the accident and found that the gear box was defective, which made the steering wheel loose. Defendant at that time also examined the brakes,

16. See Annos: 24 ALR 2d 161 at 173-177 (1952) (tires); 23 ALR 2d 539 at 559-563 (1952) (steering mechanism); 170 ALR 611 at 628-633 (1947) (brakes); 74 ALR 1198 (1931), supp 86 ALR 1145 at 1148 (1933), 96 ALR 1479 at 1482 (1935); 9 ALR 2d 1337 at 1343-1347 (1950) (car door).

which were pulling to the left, and could find nothing wrong (at 688-689). The court said:

> "If this were a simple negligence case, we would have grave doubt of the sufficiency of the evidence to raise a jury question. * * *" (at 689-690)

There was manifestly no evidence of gross negligence under the statute.

5. Few airplane cases have presented this question.[17] One source of litigation has been the Warsaw Convention, which permits certain air carriers to limit their liability except in cases of wilful or wanton misconduct of their employees. In *Grey v. American Airlines, Inc.*, (CA 2 1955) 227 F2d 282 at 286, cert den (1955) 350 US 989 one of the acts complained of to break limitation was the use of known defective equipment. The court said:

> "Much is also said on plaintiffs' behalf of defective instruments and previous backfiring by the engine which was feathered when near Nashville, *but it is abundantly plain to us that each and every member of the crew thought the plane was airworthy when they left Washington, D.C. for Dallas;* and the evidence referred to is of trivial consequence." (at 286-287; emphasis supplied)

17. In *Hanson v. Lewis*, (1937) 11 Ohio Ops 42 insufficient fuel was charged as ordinary negligence, and the court held only that the automobile guest statute did not apply by analogy to airplane cases.

In *Pekelis v. Transcontinental & Western Air, Inc.*, (CA 2 1951) 187 F2d 122, cert den (1950) 341 US 951 the plaintiff charged that defendant's mechanic intentionally failed to perform a necessary safety test on a faulty altimeter. The appellate court held that the trial judge properly rejected plaintiff's request for an instruction that

> "* * * 'A deliberate purpose on the part of the carrier or one of its employees not to discharge some duty necessary to safety may constitute wilful misconduct.'
>
> "* * * because it failed to state that the employee *must either have known that the test was necessary for safety, or his duty to make it must have been so obvious that in failing to make it his conduct would be reckless, rather than merely negligent.* * * *" (at 125; emphasis supplied)

The court defined wilful conduct in terms substantially identical with those adopted by the Oregon court:

> "* * * the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, * * *
>
> "* * * the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission, * * *" (at 124)

In *US v. Alexander*, (CA 4 1956) 234 F2d 861 at 867, cert den (1956) 352 US 892, an action under the Federal Tort Claims Act (28 USCA § 1346(b)), liability was sought to be predicated on wanton or wilful misconduct. The court said:

> "* * * The maintenance and the operation of the plane were in the hands of the United States and the district judge found negligence on the part of the Government, in that the crash was caused by the failure of the gas selector pin to function and that the pilot knew that it had been stiff and hard to operate and there was no showing that the defect had been remedied by repair or replacement. The judge also found that the pilot was negligent in the manner in which he attempted to make the emergency landing. We need not examine the evidence on these points in detail, for even if it shows a breach of duty no one contends that it warrants a finding of wanton or wilful misconduct."

Finally, in *Goepp v. American Overseas Airlines*, (1952) 281 App Div 105, 117 NY Supp 2d 276 at 281, aff'd (1953) 305 NY 830, 114 NE2d 37, cert den (1953) 346 US 974 a misinterpretation of safety regulations was held insufficient to break limitation. The court said:

> "As to the asserted violations, even if the pertinent regulations were susceptible of varying interpretations, and defendant's version thereof were incorrect, there is no proof that defendant's interpretation was conceived in bad faith, that it was arrived at with any intimation that it was incorrect, or that it was arrived at, or effectuated, in a disregard of the

possible consequences of an erroneous interpretation. These would be necessary elements to establish wilful misconduct. * * * There must be * * * a conscious intent to do or to omit from doing the act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct."[18]

While failure to exercise reasonable care to inspect a machine properly prior to flight may be ordinary negligence (*Scarborough v. Aero Service, Inc.*, (1952) 155 Neb 749, 53 NW2d 902; Anno: 30 ALR2d 1172 (1953) (preflight inspection)), it is perfectly apparent from this record that defendant thought the tank was full, and there was no evidence of an attitude of indifference.

Defendant's conduct when the engine failed

Equally, there was no evidence that defendant was guilty of gross negligence when the engine failed. While there was evidence that he did not follow standard procedures when the plane stalled,[19] defendant testified that he reacted as he did because he lost sight of the

18. See also *Braughton v. United Air Lines, Inc.*, supra, (DC Mo 1960) 189 F Supp 137 at 145. Cf *American Airlines, Inc. v. Ulen*, (CA DC 1949) 186 F2d 529 (deliberately conceived dangerous flight pattern which violated safety regulations; *Held:* evidence of wilful and wanton misconduct); *KLM v. Tuller*, (CA DC 1961) 292 F2d 775 (failure to instruct passengers on location and use of life jackets, or to give distress signals before or after crash; failure of ground agent to check on missing plane; *Held:* evidence of wilful and wanton misconduct).

19. See Anno: 74 ALR 2d 615 at 617-619 (1960).

horizon and could not tell where the ground was. The undisputed testimony was that while defendant became excited and frightened, he did everything he could to save the plane, including himself and his passengers. He opened the engine and operated the throttle in an effort to get it going again, and thought it would do so. He did not switch tanks, because he had checked the left tank and knew there was fuel in it. There was, in short, no evidence that his failure to do what others said he should have done resulted from indifference or was, at most, other than an inadequate response to the emergency. See *Morris v. Williams*, supra, (1960) 223 Or 50 at 59, 353 P2d 865.

In *Grey v. American Airlines, Inc.*, supra, (CA 2 1955) 227 F2d 282 at 286, cert den (1955) 350 US 989 an emergency arose in an airliner approaching Dallas, Texas, and the first officer, without orders from the captain, took action which the evidence showed might caused the accident. The Court of Appeals said:

> "* * * The plane was *in extremis;* whatever the First Officer did or failed to do was done to save the plane and the lives of all on board including his own.
>
> "True it is that the jury were entitled to disregard the testimony of the First Officer, or any part of it, and to accept the testimony of the Captain in its entirety. But even so the record is still devoid of any evidence of wilful misconduct."

Under Oregon law, conduct which is a response to an emergency does not constitute gross negligence, and the trial court erred in submitting the question to the jury.

2. There was no evidence that the left fuel tank was empty.

All of the testimony showed that 10 or 15 minutes after the accident, gasoline was still dripping from the left wing onto the dry ground and had made a wet spot on the ground of substantial size. It also showed that the hole in the fuel cell was "recent damage" and was almost certainly caused by the accident. The flight records and log established that the plane had been flown less than two hours since both tanks were filled. The testimony is also undisputed that the left tank gauge showed ¾ full when the plane took off, and showed empty when the plane was examined after the accident. Mr. Withers testified that the gauge was operating properly when he flew the plane.

The only other evidence was (1) that the noise of the failing engine and the condition of the carburetor after the accident indicated that no gasoline was reaching the engine; (2) that 15 minutes after the accident the tank was empty; and (3) disputed testimony that defendant had told Mr. Schiewe that the gauge did

not work properly. This was not substantial evidence of a lack of fuel.

> "* * * No conflict in evidence occurred where the testimony of some witnesses merely showed that they did not see or smell gasoline, while other evidence indicated there was such fuel. In consequence, if the jury's verdict was based upon its finding there was an insufficient fuel supply, that finding was without support of any substantial evidence." (*Keldsen v. Brimmer,* (1958) 79 Wyo 152, 331 P2d 825 at 830)

CONCLUSION

No one knows why this unfortunate accident occurred. Certainly, plaintiffs' theory was disproved. There was no evidence of gross negligence under the Oregon Airplane Guest Passenger Statute, and the trial court erred in denying defendant's motions for a directed verdict.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney

APPENDIX

Exh	Ident[1]	Off	Rec
Pl 3[2]			
Pl 4[3]			
Pl 5[4]			
Pl 6		157	157-158
Pl 7		157	158
Pl 8		42	42
Pl 10		233	233
Pl 11		233	233
Pl 12		233	233
Pl 13		42, 234	42, 234
Pl 14-A		234	234
Pl 14-B		234	234
Pl 14-C		234	234
Pl 15		234	234
Pl 23		84	85
Pl 23-A		84	85
Pl 26		208	209
Pl 27		208	208
Pl 28		208	208
Pl 29		208	209

1. Identification of exhibits was waived in the pretrial order (R 9-12).
2. Parts of Pl Exh 3 (deposition of Dr. Dale R. Popp) were read to the jury. They are identified in the record (Tr 231-236, 242-245).
3. Parts of Pl Exh 4 (deposition of Dr. H. M. Rodney) were read to the jury. They are identified in the record (Tr 245-248).
4. Pl Exh 5 (deposition of Carl J. Christenson) was read to the jury. It is transcribed in full in the transcript (Tr 131-156).

APPENDIX—(Continued)

Exh	Ident[1]	Off	Rec
Pl 30		146	146-147
Pl 31		7	7
Pl 32		93	94
Pl 33		93	94
Def 2-D		180	180
Def 2-K		168	168
Def 2-L		168	168
Def 4-A to 4-I		283	283
Def 4-J		282	282-283
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Def 6		285	286
Def 8-A		282	282
Def 8-B		282	282
Def 8-C		282	282
Def 9		283	283

No. 18540

United States
COURT OF APPEALS
for the Ninth Circuit

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Appellant,

vs.

RALPH SCHIEWE, BETTE SCHIEWE, his wife, and JANICE NECHANICKY,
Appellees.

RALPH SCHIEWE and JANICE NECHANICKY,
Cross-Appellants,

vs.

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Cross-Appellee.

BRIEF OF APPELLEES AND CROSS-APPELLANTS

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

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BRIEF OF APPELLEES AND CROSS-APPELLANTS

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

JURISDICTION

This is an action for personal injuries sustained by plaintiffs-appellees in an airplane crash which occurred in Klamath Falls, Oregon (R. 15). Plaintiffs are citizens and residents of the state of Washington, and defend-

ant-appellant is a citizen and resident of the state of Oregon. The matter in controversy between each of the plaintiffs and the defendant exceeds the sum of $10,000 exclusive of interest and costs (R. 15).

This case was tried by a jury and verdicts were returned and a judgment was entered in favor of plaintiff Ralph Schiewe in the amount of $1,200, plaintiff Bette Schiewe in the amount of $12,000, and plaintiff Janice Nechanicky in the amount of $2,000 (R. 26-30). Thereafter defendant filed a motion for judgment notwithstanding the verdict (R. 31-32) and plaintiffs Ralph Schiewe and Janice Nechanicky, for themselves alone, filed a motion for a new trial limited to the issue of damages or, in the alternative, a new trial on all issues (R. 34-36). The District Court denied all motions on December 19, 1962 (R. 38-39).

Defendant appealed from the judgment on January 14, 1963 (R. 40). Plaintiffs Ralph Schiewe and Janice Nechanicky cross-appealed from the judgment and from the order denying their motion for a new trial on January 16, 1963 (R. 59-60).

The District Court had jurisdiction under 28 U.S.C. Sec. 1332, as amended, and this Court has jurisdiction under the provisions of 28 U.S.C., Sec. 1291, as amended.

OPINION BELOW

The judgment of the District Court was entered without opinion upon the verdicts of the jury. The District Court rendered an oral opinion on December 17, 1962, denying defendant's motion for judgment notwithstand-

ing the verdict and the motion of plaintiffs Ralph Schiewe and Janice Nechanicky for a new trial. This oral opinion is reported in the transcript (Tr. 352-356).

STATUTES INVOLVED

ORS 30.120

> "No person transported by the owner or operator of aircraft as his guest without payment for such transportation shall have a cause of action for damages against the owner or operator for injury, death or loss, in case of accident, unless the accident was intentional on the part of the owner or operator or caused by his gross negligence or intoxication or his reckless disregard of the rights of others."

STATEMENT OF THE CASE

This is an action by three plaintiffs against the defendant to recover damages for personal injuries sustained as the result of an airplane crash on August 14, 1959, at Kingsley Field in Klamath Falls, Oregon (R. 15).

Plaintiff Ralph Schiewe and plaintiff Bette Schiewe are husband and wife (Tr. 8). Plaintiff Janice Nechanicky is the sister of Ralph Schiewe (Tr. 12). The defendant is the half-uncle of plaintiff Bette Schiewe (Tr. 65).

Defendant was the owner and operator of the Klamath Aircraft Service located at Kingsley Field in Klamath Falls, Oregon, and the owner and operator of the airplane involved in this accident (R. 15, Pltf. Ex. 6, Tr. 292). The airplane is described as a single engine

Piper Comanche, Model PA 24-180, Registration No. N-5740 P (Pltf. Ex. 6; Def. Ex. 5, 9).

Defendant had invited the plaintiffs to go for a ride in his airplane and they were guests of the defendant at the time of the crash (Tr. 14). An aircraft guest passenger statute was in effect in Oregon at this time (Br. 3).

As stated by the defendant, the District Court submitted seven specifications of gross negligence and reckless disregard of the rights of the plaintiffs to the jury. These specifications were as follows:

3. In operating and flying said airplane without sufficient gasoline in the left fuel tank.

4. In failing to properly determine the amount of gasoline in the left fuel tank.

5. In attempting to check the amount of gasoline in the left fuel tank without the aid of lights or a measuring device.

9. In failing to switch from the left fuel tank to the right fuel tank when the engine failed or commenced to fail.

10. In failing to lower the nose of said airplane when the engine failed or commenced to fail.

11. In failing to maintain a straight glide path.

12. In attempting to turn said airplane to the left at a time when the engine thereof had failed or had commenced to fail.

(R. 16-17; Tr. 316-317).

All of the plaintiffs received compression fractures of the low back together with other injuries as a result of this crash (R. 17-19; Popp Dep. 5-6, 55-58, 72-76; Rodney Dep. 6). The injuries were permanent and resulted in permanent disability (Popp Dep. 38, 61, 70, 75).

After receiving instructions as to the applicable law, the jury found defendant guilty of gross negligence and reckless disregard of the rights of the plaintiffs and awarded plaintiff Bette Schiewe the sum of $12,000, plaintiff Ralph Schiewe the sum of $1,200, and plaintiff Janice Nechanicky the sum of $2,000 (R. 26-30). After judgment was entered, the defendant filed a motion for judgment notwithstanding the verdict (R. 31-32), and Ralph Schiewe and Janice Nechanicky filed a motion for a new trial limited to the issue of damages or, in the alternative, on all issues on the grounds that the verdicts were inadequate and against the clear weight of the evidence as to damages (R. 34-36). Plaintiff Bette Schiewe did not file a motion for a new trial. The District Court denied all motions (R. 38-39).

Plaintiffs Ralph Schiewe and Janice Nechanicky have cross-appealed from the judgment and from the order denying their motion for a new trial (R. 59-60). This brief combines the appellees' answering brief and the opening brief of cross-appellants Ralph Schiewe and Janice Nechanicky. The cross-appeal is considered infra (Br. 27-32).

QUESTIONS PRESENTED

We believe that the only question involved in this appeal is whether there was sufficient evidence of gross negligence or reckless disregard of the rights of the plaintiffs to submit this case to the jury.

SUMMARY OF ARGUMENT

1. An issue of fact was presented as to whether defendant was guilty of gross negligence or reckless disregard of the rights of the plaintiffs.

2. There was sufficient evidence to submit this case to the jury in that the evidence showed that defendant was guilty of gross negligence and reckless disregard of the rights of the plaintiffs in operating the airplane without sufficient gasoline and in causing the airplane to crash.

ARGUMENT

This is an aggravated case of gross negligence and reckless conduct. The evidence clearly showed that the defendant operated this airplane without sufficient gasoline in the left fuel tank and made a wholly inadequate inspection to determine the presence or absence of fuel prior to the flight (Br. 8-15). The evidence shows that such examination was made in a condition of dusk or darkness, without a light and without any type of measuring device (Pltf. Ex. 7, 8; Tr. 15-17, 70-71, 117-118, 148). The evidence further shows that this casual examination of the fuel supply was made when the defendant

knew that the left fuel gauge was defective (Tr. 22-23, 118).

The evidence in this case further shows that the defendant took no care or precaution whatsoever to prevent the airplane from crashing after it ran out of fuel and failed to use the slightest care in order to safely land the airplane. It was clearly shown that he failed to take the most elementary steps necessary for the safety of the airplane, such as changing from the left fuel tank to the right fuel tank or lowering the nose of the airplane to maintain air speed or in merely landing the airplane which was then directly over the runway (Br. 15-19). Instead the defendant did the very thing which is condemned by all pilots as improper—he turned the airplane away from the runway and caused it to stall and crash (Pltf. Ex. 31; Tr. 27, 30, 101, 150, 201, 222-223).

It seems to the appellees that the question before the Court is simply whether there was any evidence to support the verdict of the jury. In deciding this question, it is, of course, well established that the evidence must be considered in the light most favorable to the party who received the verdict of the jury and they should be given the benefit of every reasonable inference that can be drawn from the evidence in their favor. *KLM* v. *Tuller,* 292 F.2d 775 (CA DC, 1961), *Turner, Adm'r.* v. *McCready, et al,* 190 Or 28, 55, 222 P.2d 1010 (1950).

We submit that an examination of the record will indicate that the defendant has primarily been arguing facts and inferences to be drawn from facts. We also believe that the defendant has misconstrued *Williamson* v. *Mc-*

Kenna, 223 Or 366, 354 P.2d 56 (1960) as requiring subjective proof of a reckless state of mind. It is clear that an objective rather than a subjective standard should be applied. *Williamson* v. *McKenna,* supra, at 396-398; *Taylor* v. *Lawrence,* 229 Or 259, 366 P.2d 735 (1961); *Nielsen* v. *Brown,* 75 Or. Adv. Sh. 161, — Or. —, 374 P.2d 896 (1962).

The Airplane Ran out of Gas

Defendant has argued that there was no evidence that the left fuel tank was empty (App. Br. 29). The record does not sustain defendant's position.

Defendant primarily relies on the flight and fuel records. He claims that they established that the airplane had been flown less than two hours since both tanks were filled (App. Br. 29).

The only difficulty with this argument is that the jury undoubtedly did not believe that the records were correct. The fuel records (Def. Ex. 8-A) were in a very unsatisfactory condition. An entry had been squeezed in above the gas entry of August 12, 1959, and there was some question about its authenticity (Tr. 268-270). The employee in charge of the gasoline could not even identify the entry as being in his handwriting (Tr. 269).

The daily flight records were more suspicious (Def. Ex. 8-B). The airplane involved in this crash is identified as PA 24 and as 5740P. The entries are completely out of order in that they show flight time of this airplane on August 11th, August 12th, then on August 13th, then an entry on August 12th for a pilot by the name of Gor-

don which apparently refers to this airplane, then another entry for August 13th, then two more entries back to August 12, 1962 for this airplane.

The last entry was for a flight by the defendant which showed 7 hours and 50 minutes of flight time. The defendant attempted to explain this entry by stating that he had flown the airplane a week prior to this date (Tr. 299). The entries otherwise appear to be in order except for the crucial time immediately prior to the crash. The jury was entitled to give little credence to these records.

There was little doubt that this airplane ran out of gas. The witnesses testified that "the engine started to sputter" (Tr. 26), it "began to sputter and cough." (Tr. 72), and "then there was a coughing and sputtering sound" (Tr. 118). The engine sounded like an engine running out of gas (Tr. 28, 72).

One of the defendant's employees testified: "The engine kept running spasmodically, like it would get a shot of fuel and then none, and then another shot" (Tr. 100). When the engine commenced to fail, the defendant kept pumping the throttle (Tr. 26, 51, 149). Mr. Withers, a flight instructor employed by the defendant, testified that he was the last one to fly the airplane before the crash (Tr. 254). He testified that he did not know whether he ran the left tank down or not and that it was possible that he had run it almost empty (Tr. 254).

Two employees of the defendant (McNeal and Burton) arrived at the scene of the crash within 10 or 15 minutes after it occurred (Tr. 113, 206). The tank se-

lector was pointed to the left fuel tank and the left fuel tank was dry (Tr. 204-205).

Both employees observed a small amount of gasoline dripping from the edge of the wing. "The dripping was very, very little." (Burton, Tr. 105). "A very small amount of gasoline dripping off the end of the wing . . ." (McNeal, Tr. 206).

There was a wet spot on the ground about 5 or 6 inches wide and 15 to 18 inches long (Tr. 105, 206). The ground was not saturated or puddled (Tr. 105). There was such a small amount of gasoline that there was hardly any smell (Tr. 207).

It was determined that there was a small cut or slit in the left fuel tank. Mr. Christenson, the FAA investigator, testified that it was about 2 inches long and in the nature of a slit as might occur in a rubber tube (Tr. 144). The cut was caused by impact damage (Pltf. Ex. 7, Tr. 212-214).

The fuel tank was left in the possession of the defendant (Tr. 145). It was later altered by an insurance adjuster employed by defendant's insurance company (Tr. 4-6). McNeal testified that an investigator for the defendant lengthened the slit in the tank with a knife and also cut two holes in it (Tr. 214-215).

McNeal had been employed by the defendant as an aircraft mechanic and a foreman for approximately 11 years (Tr. 197). He was a licensed air engine and frame mechanic and also a pilot (Tr. 197). He testified that he looked into the left fuel tank immediately after the crash

because it was his opinion that the engine had quit from lack of fuel (Tr. 205).

After the crash, Mr. McNeal removed the carburetor from the airplane and found that it only contained one teaspoonful of unusable gasoline whereas it should have contained approximately a cup (Tr. 210-211). The carburetor was in good condition and no fuel could have leaked from it (Pltf's Ex. 26, Tr. 141-142, 209-211). There was nothing wrong with the airplane which would have prevented gasoline from getting to the carburetor (Tr. 211-212).

The airplane was new and in perfect condition prior to the crash (Def. Ex. 6, Tr. 114, 216, 286). After the crash, it was determined that the fuel lines were undamaged and that the fuel pumps operated properly (Tr. 142, 212). The FAA investigator could not find any evidence of malfunction of equipment or mechanical failure (Pltf. Ex. 7, Tr. 150).

Mr. McNeal could not find any mechanical cause for the failure of the airplane (Tr. 216). It was his opinion that it had run out of fuel (Tr. 205, 217; see also, Schiewe, Tr. 8-9, 60). Mr. McNeal could find no other cause for the engine failure (Tr. 217).

In view of this evidence the jury was not only entitled to infer that the airplane ran out of gasoline but there was direct and positive testimony that it did, in fact, run out of gasoline.

Defendant was Grossly Negligent in the Manner in which he Attempted to Check the Fuel

The defendant and the plaintiffs arrived at the airport at about 7:15 p.m. or somewhere between 7:00 and 7:30 p.m. (Tr. 15, 70, 117). Sunset occurred in Klamath Falls at 7:09 p.m. (Pltf. Ex. 8). The aircraft was cleared to taxi at 7:41 p.m. and was cleared to takeoff at 7:51 p.m. (Pltf. Ex. 7, Tr. 149).

When the defendant and the plaintiffs arrived at the airport "It was dusk. It was getting dark." (Tr. 15); "Well, it was getting dark quite fast by that time." (Tr. 70). The runway lights and lights in the various buildings were on (Tr. 71, 118).

According to the FAA investigation, the defendant checked the gasoline in the left fuel tank approximately 20 minutes after sundown (Pltf. Ex. 7, Tr. 148). In addition, the airplane was wheeled out in front of a hangar where it was in a shadow (Tr. 16).

The gas tank opening is a foot or so back from the edge of the wing (Tr. 17). The opening consists of a small metal door and then there is an inner cap similar to a cap on a thermos bottle (Tr. 17). A filler neck then leads into the gas tank (Tr. 288). The top of the tank opening is illustrated by defendant's Exhibits 4-C to 4-G.

Defendant attempted to check the amount of gasoline in the left fuel tank by merely looking into it (Tr. 16-17). He did not use a light or a measuring device or his finger (Pltf. Ex. 7, Tr. 17, 148). The defendant did not check the fuel in the right fuel tank (Tr. 19-20).

The customary practice is to use some sort of a measuring device to check the level of the gasoline (Tr. 18-19). It is impossible to measure the distance in the gas tank by looking down into the hole (Tr. 19, 46). The level of the fuel can be misleading unless you have a good light (Tr. 227-228). Defendant's witness Withers testified that the usual practice when it is dark or dusk is to check the fuel by using a flashlight or possibly your finger (Tr. 253-254).

The jury was entitled to conclude that this casual inadequate check of the gasoline was made by the defendant at a time when he had had knowledge that the left fuel tank was defective (Tr. 22-23, 118). The jury, of course, was further entitled to find that there was in fact such a small amount of gasoline in the left fuel tank that the engine failed almost immediately after takeoff (Br. 8-11).

Defendant has taken the position that there was no duty on the part of the defendant to inspect and he has cited a number of automobile cases (App. Br. 22-24). Defendant argues that the basis of liability is not what he should know but what he actually knows and fails to tell his guests (App. Br. 22).

This is not the Oregon rule. It is not necessary that the defendant actually know of the risk. If the danger is obvious, he will presumed to have been aware of it. The standard is an objective one and the state of mind may be inferred. *Williamson* v. *McKenna,* 223 Or. 366, 396-398, 354 P.2d 56 (1960); *Taylor* v. *Lawrence,* 229 Or. 259, 366 P.2d 735 (1961); *Nielsen* v. *Brown,* 71 Or. Adv. Sh. 161, — Or —, 374 P.2d 896 (1962).

The automobile cases cited by the defendant involve various factual circumstances which are not similar to the facts involved in the present case. They do not apply where there is active negligence. They could only possibly be applicable to a situation where there is a mechanical defect which is unknown to the defendant. Such is not the case here.

It is obvious that the duty to inspect depends upon the circumstances and the degree of danger involved. 2 Harper & James, The Law of Torts, Sec. 16.9, n. 11, page 932. The operation of aircraft calls for a greater degree of care than the operation of other instrumentalities. *Brunt* v. *Chicago Mill & Lumber Co.,* 243 Miss. 607, 139 S.2d 380, 383 (1962). As was stated in *Walthew* v. *Davis,* 201 Va. 557, 111 S.E.2d 784 (1960):

> "What would be slight negligence in the operation of an automobile might be gross negligence with disastrous results in the operation of an airplane. A guest displeased with and alarmed at his host's negligent operation of an automobile may get out and take to the highway on foot. A guest in an airplane has no such election, but must suffer the consequences of his host's negligence which is frequently fatal." (111 S.E.2d at 786.)

Defendant surely cannot be contending that there is no duty to determine whether an airplane has gasoline in it before flight. The circumstances are entirely different from attempting to drive an automobile without gasoline and in attempting to fly an airplane without fuel.

In *Scarborough* v. *Aeroservice, Inc.,* 155 Neb. 749, 53 N.W.2d 902 (1952), an airplane crashed because of an excessive amount of water in the tail of the airplane.

Defendant was charged with negligence in failing to inspect before the flight. The court stated:

> "The evidence disclosed a tail-heavy condition (water) in this plane which could and did result in a serious accident. This type of inspection is just as important as ascertaining the sufficiency of the fuel and oil, and the operation of the engine." (53 N.W.2d at 909)

The defendant even knew that the gasoline gauge was defective (Tr. 22-23, 118). This should have put him on notice that he would have to exercise more care in determining the amount of gasoline in the tank. See *George* v. *Stanfield,* 33 F. Supp. 486 (DC Idaho, 1940) applying the Oregon automobile guest passenger statute; and Annotation, 86 A.L.R. 1145 at 1148.

Defendant was Grossly Negligent in Causing the Airplane to Crash

The parties apparently boarded the airplane at approximately 7:41 p.m. (Tr. 71, 149). Mrs. Schiewe and Miss Nechanicky sat in the rear seat and the men sat in the front seats (Tr. 20, 71).

Defendant insisted that Mr. Schiewe sit in the left seat of the airplane where the pilot usually sits (Tr. 20-21). The pilot normally sits in the left seat because the more important instruments are located on the left side of the instrument panel and most people are right-handed (Tr. 21, 221). The flight instruments on this particular airplane were on the left side (Tr. 284).

Defendant has stated in his brief that both Mr. Schiewe and the defendant were pilots (App. Br. 6). Mr.

Schiewe received his license in 1948 and it expired and ceased to be valid one year later, in 1949, because he did not fly enough (Tr. 10-11). Ralph Schiewe had only flown three or four times since 1949 (within ten years) in private airplanes (Tr. 11). Defendant was the owner and operator of the Klamath Aircraft Service and had been a pilot for approximately 20 years (R. 15, Tr. 14, 271). The experience and knowledge of Mr. Schiewe and the defendant were hardly comparable.

The defendant took off and although he had contended otherwise in the Pre-Trial Order, he admitted that he was the pilot at the controls and was flying the airplane (R. 20; Pltf. Ex. 6; Tr. 25, 150, 292).

After the airplane had gained an altitude of 75 to 100 feet and had an air speed of about 95 miles an hour, the engine commenced to sputter and miss like it was running out of gasoline (Tr. 26, 28, 72, 100).

The portion of the runway being used by the defendant was about 6,000 feet long with an additional gravel overrun of approximately 1,000 feet (Tr. 202). When the engine first started to miss, there was 4,000 feet of runway in front of the defendant (Tr. 202). When the engine finally quit, there was still 1,500 to 2,000 feet of runway in front of the defendant (Tr. 203). See Plaintiff's Exhibit 31 and the testimony of Mr. McNeal for the various positions of the airplane prior to the crash (Tr. 200-202).

According to the Owner's Manual, the airplane can land in 600 feet (Def. Ex. 5, p. 5). Defendant was directly over the runway all of the time that the engine was

missing and was still over the runway when the engine quit (Pltf. Ex. 31, Tr. 27, 150). There was no reason why he could not have landed the airplane on the runway (Tr. 203).

The Owner's Manual, Defendant's Exhibit 5, page 29, states:

> "Engine Failure:
> The most common cause of engine failure is mismanagement or malfunction of the fuel system. Therefore, the first step to take after engine failure is to move the fuel selector valve to the tank not being used. This will often keep the engine running even if there is no apparent reason for the engine to stop on the tank being used."

The defendant did not change the fuel selector valve although it is located between the seats and is easy to reach (Def. Ex. 4-B, Tr. 26, 60, 149). A reasonably prudent pilot would have changed the fuel selector valve to the right tank (Tr. 29). The defendant knew that if you switch to another tank, the engine will start (Tr. 293).

An airplane can still fly with the engine stopped if air speed is maintained (Tr. 225). It will stall when the wings cannot produce enough lift to keep it flying (Tr. 225). It is necessary to maintain air speed to prevent a stall and to permit the airplane to glide (Tr. 27-28, 223).

Instead of lowering the nose and maintaining air speed, the defendant kept the airplane in a "nose-high attitude" (Tr. 26-27, 100-102, 201). It should have been in a "nose-down attitude" (Tr. 201). A reasonable prudent pilot under these circumstances would have lowered the nose and maintained his air speed (Tr. 29, 222-223).

When the engine finally quit, the defendant turned the airplane sharply to the left causing it to stall and crash (Pltf. Ex. 31, Tr. 27, 30, 101, 150, 201). He should have attempted to land straight ahead (Tr. 222). It was not reasonable or prudent to attempt a turn at that altitude (Tr. 30, 223). Pilots are trained not to turn when the engine quits (Tr. 60-61).

Defendant states in his brief that he did everything he could to save the plane, including himself and his passengers (App. Br. 28). The evidence indicates that he did everything absolutely wrong and in utter disregard of the safety of the airplane and its occupants.

Defendant claims that his conduct at the time that the engine commenced to fail should be considered as an inadequate response to an emergency (App. Br. 28). In the first place, these circumstances are not so unusual that a pilot should not properly respond. Pilots are trained to react and perform these procedures in this type of a situation (Tr. 60-61, 225).

In the second place, the jury was instructed on defendant's theory of an emergency and they found against the defendant on this issue (Tr. 326-327). This was at most a fact question. Moreover, a person cannot invoke the emergency doctrine if the emergency is created by his own negligence. *Nicholas* v. *Fennell,* 184 Or. 541, 552, 199 P.2d 905 (1948), *Tuite* v. *Union Pacific Stages, et al,* 204 Or. 565, 596, 284 P.2d 333 (1955).

An inference of negligence is usually created when the evidence tends, as in this case, to exclude all causes other than human fault for an airplane crash. *Lange* v.

Nelson-Ryan Flight Service, Inc., 259 Minn. 460, 108 N.W.2d 428 (1961), was quite similar to this case in that the weather was good and there was no evidence of malfunction or mechanical failure. The Court held that an inference of negligence was created which was sufficient to sustain a verdict for the plaintiff. This Court has held substantially the same in *Boise Payette Lumber Co.* v. *Larsen,* 214 F.2d 373 (CA 9, 1954). See also Annotation, 6 A.L.R.2d 528 "Res ipsa loquitur in aviation accidents".

A higher degree of care is required in the operation of aircraft than in the operation of land or water vehicles. *Walthew* v. *Davis,* 201 Va. 557, 111 S.E.2d 784 (1960); *Brunt* v. *Chicago Mill & Lumber Co.,* 243 Miss. 607, 139 S.2d 380, 383 (1962). A pilot may be guilty of negligence in the operation of an airplane on take-off. *Robart* v. *Brehmer,* 92 C.A.2d 830, 207 P.2d 898 (1949), Annotation 74 A.L.R.2d 615. He may also be guilty of negligence in failing to follow correct procedure when an airplane is approaching a condition of stall. *Grimm* v. *Gargis,* 303 S.W.2d 43, 74 A.L.R.2d 599 (Mo. 1957). See also, Annotation 12 A.L.R.2d 656 "Liability for Injury to Guest in Airplane."

The acts and conduct of the defendant, taken individually or as a series of negligent acts, could properly be considered by the jury as amounting to gross negligence under all of these circumstances. *Williamson* v. *McKenna,* 223 Or. 366, 400, 354 P.2d 56 (1960), *Turner, Adm'r* v. *McCready, et al.,* 190 Or. 28, 54, 222 P.2d 1010 (1950).

Defendant's Gross Negligence was Properly Submitted to the Jury

The Trial Court properly applied Oregon law in submitting this case to the jury.

There are no decisions in Oregon interpreting the aircraft guest passenger statute but there are a number of cases interpreting the automobile guest passenger statute. Although the application of the facts to the law would probably not be the same in cases involving aircraft because of the increased risk, the general principles of the automobile guest passenger statute would probably apply.

The defendant has analyzed *Williamson* v. *McKenna,* 223 Or. 366, 354 P.2d 56 (1960), in some detail. In this case a guest passenger brought an action for damages for injuries sustained in a collision which was the result of the host driver attempting to make a left turn at a Y-intersection.

The Oregon court re-examined the automobile guest passenger statute and held that gross negligence, as used in this statute, means reckless conduct as defined in 2 Restatement, Torts, Section 500. The Court further defined the character of reckless conduct in more detail as follows:

1. The defendant must intentionally do the act or intentionally fail to do the act which involves the risk.

> The Court stated that this does not mean that the defendant intended to cause the harm. Reckless conduct involves the choosing of a course of action

which spells danger. The choice of action is not necessarily a real mental operation but may be inferred from manifestly dangerous conduct (at 395-396).

2. The defendant's conduct must involve a high degree of probability that harm will result.

The Court stated that this is merely another way of saying that the conduct is dangerous. The strong probability that harm will result is, of course, the probability which is or should be apparent to the defendant (at 396).

3. It is not necessary that defendant actually know of the risk.

The Court stated that if the danger is obvious, the defendant will be presumed to have been aware of it. Recklessness may be found in circumstances where the defendant did not appreciate the extreme risk but where any reasonable man would appreciate it. The element of recklessness may, under some circumstances, be inferred from evidence of the driver's conduct in the light of conditions and of what he must have known. The standard is an objective one as it is in the case of negligence (at 396-399).

4. Defendant's actual consciousness of the risk, although not necessary to prove reckless conduct, may be a significant factor in establishing his liability (at 399).

5. Inadvertent conduct, without more, will not constitute recklessness.

The Court is referring to momentary thoughtlessness (at 399-400).

6. A series or combination of negligent acts may constitute reckless conduct if taken together they indicate the so-called reckless state of mind.

> The Court stated that a combination of negligent acts may be sufficient to make out a case of gross negligence (at 400-401).

We submit that the most important consideration is whether the conduct in question involves a high degree of probability that harm will result. 40 Ore. Law Rev. 278, 280. Only exceptional circumstances can make it reasonable to adopt a course of conduct which involves a high degree of risk and serious harm to others, and such conduct cannot be justified unless it is of great social value. Comment a, Restatement, Torts, Sec. 500.

This case is well within the rule set forth in *Williamson* v. *McKenna*. The conduct of the defendant involved a high degree of probability that harm would result. It involved the choosing of a course of action which spelled danger and the defendant must be presumed to have been aware of it. Any reasonable man would have appreciated the risk and the element of recklessness can be inferred from the evidence of defendant's conduct in the light of these conditions and what he must have known.

Subsequent Oregon cases cited by the defendant are in no way similar to the case at bar. These cases merely involve situations where the defendant was driving at the indicated speed on a rainy night and was temporarily blinded by the lights of an oncoming vehicle. (*Morris* v. *Williams,* 223 Or. 50, 353 P.2d 865 (1960); where de-

fendant's vehicle went out of control after rounding a curve on the highway (*Burghardt* v. *Olson*, 223 Or. 155, 349 P.2d 792, 354 P.2d 871 (1960); where there was merely speed on entering a curve (*Holman* v. *Barksdale*, 223 Or. 452, 354 P.2d 798 (1960); where the cause of the collision was the failure of the defendant to see a flagman (*McNabb* v. *DeLaunay*, 223 Or. 468, 354 P.2d 290 (1960); where defendant drove his automobile through a stop sign (*Secanti* v. *Jones*, 223 Or. 598, 349 P.2d 274, 355 P.2d 601 (1960); where the only evidence of reckless conduct was speed based on evidence of an experiment and an inference of failure to keep a lookout (*Bradfield* v. *Kammerrer*, 225 Or. 112, 357 P.2d 278 (1960); where the defendant attempted to adjust his radio and the wheels of his automobile went into a ditch (*Bland* v. *Williams*, 225 Or. 193, 357 P.2d 258 (1960); and where defendant turned around when someone hollered and lost control of his automobile (*Stites* v. *Morgan*, 229 Or. 116, 366 P.2d 324 (1961).

None of these cases involve a situation comparable to the circumstances involved in this case. The Oregon Supreme Court has held that gross negligence was a question for the jury in a case less aggravated than the present one. *Rossman* v. *Forman*, 224 Or. 610, 356 P.2d 430 (1960).

Throughout defendant's brief he has argued defendant's state of mind from a subjective standpoint. It is clear that the Oregon test is an objective one. *Williamson* v. *McKenna*, supra (at 396-399). In *Taylor* v. *Lawrence*, 229 Or. 259, 366 P.2d 735 (1961), the Court held that it was error to require the plaintiff to prove that the

defendant consciously was unconcerned. The Court repeated that the test was an objective one (at 265). See also, *Nielsen* v. *Brown,* 75 Or. Adv. Sh. 161, — Or. —, 374 P.2d 896 (1962), where the Court held that error could be committed unless it was made clear to the jury that an objective test was to be applied.

No particular state of mind should be required for a finding of reckless or wanton misconduct. 2 Harper & James, The Law of Torts, Sec. 16.15, p. 954-955.

In airplane cases it has been held to be sufficient evidence of willful misconduct under the Warsaw Convention to have a flight plan which is less than 1,000 feet above the highest obstacle on the course. *American Airlines* v. *Ulen,* 186 F.2d 529 (C.A. D.C. 1949). In *KLM* v. *Tuller,* 292 F.2d 775 (C.A. D.C. 1961), cert. den. 368 U.S. 921, the Court held that there was evidence of willful and wanton misconduct in failing to properly instruct passengers as to life vests, in failing to broadcast an emergency message, and in failing to initiate prompt rescue operations.

It has long been the rule in Oregon that the guest passenger statute is in derogation of the common law and must be strictly construed. *Willoughby* v. *Driscoll,* 168 Or. 187, 120 P.2d 768, 121 P.2d 917 (1942).

It has also long been the rule in Oregon that where the facts are such that reasonable minds may differ as to whether there was gross negligence, it is a question of fact for the jury and not one of law for the Court. *Storm* v. *Thompson,* 155 Or. 686, 64 P.2d 1309 (1937),

Herzog v. *Mittleman,* 155 Or. 624, 65 P.2d 384 (1937). See also, 1 Willamette Law Journal, 425 at 439.

The question of whether a gross negligence case should be submitted to the jury is basically no different from any negligence case. If reasonable minds might differ as to whether certain conduct constitutes gross negligence, then the question should be one of fact for the jury.

It has been so held in Georgia where an aircraft guest passenger is required to prove gross negligence. *Sammons* v. *Webb,* 86 Ga. App. 382, 71 S.E.2d 832 (1952), *Citizens and Southern National Bank* v. *Huguley,* 100 Ga. App. 75, 110 S.E.2d 63 (1959).

In the *Sammons* case, the defendant attempted to land the airplane on a roadway at dusk and struck a guy wire. The Court held that the question of whether the defendant was guilty of gross negligence was for the jury and stated:

> "It is also a jury question where reasonable minds might disagree as to whether the negligence charged is ordinary or gross, or so charged with reckless disregard of consequences as to amount to wanton misconduct." (71 S.E.2d at 840)

The Trial Court concluded that there was sufficient evidence of reckless conduct to submit this case to the jury (Tr. 305, 306). The Trial Court again reviewed this case in connection with defendant's motion for judgment notwithstanding the verdict and stated:

> ". . . if this defendant was as casual about looking at the gasoline in the tank as some of the evidence would indicate, and which the jury was entitled to

believe, it seems to me that it would be about the same thing as a man going around with a loaded gun with the safety off (Tr. 352).

"The evidence is undisputed that the thing to do would be to point the nose down and make a normal landing on the runway. In place of doing that, or instead of reaching down and doing what should be a normal reaction of any experienced pilot, turning to the other gas tank, or attempting to land in a normal way, he took the very action that is condemned by all the rules: that is, when the wings had lost their lifting power he made a left turn which of course destroyed what little lifting power remained, and there was a crash. For an expert pilot to make that maneuver when he knows, under his own testimony, that the motor is quitting, could, I believe, be viewed by the jury as evidence of gross negligence." (Tr. 353-354)

The jury was entitled to find gross negligence under the evidence in this case.

BRIEF OF CROSS-APPELLANTS RALPH SCHIEWE AND JANICE NECHANICKY

STATEMENT OF THE CROSS-APPEAL

A statement of the pleadings and facts disclosing the jurisdiction of the District Court and the jurisdiction of this Court is set forth in appellees' jurisdictional statement (Br. 1-2).

As a result of the airplane crash, all of the plaintiffs sustained compression fractures of the low back (Popp Dep. 5-6, 55-58, 72, 74-76). The medical testimony was undisputed that the injuries were permanent (Popp. Dep. 38, 61, 70, 75). The jury returned a verdict for plaintiff Bette Schiewe in the amount of $12,000 and verdicts for Ralph Schiewe for $1,200, and Janice Nechanicky for $2,000 (R. 26-28).

Plaintiff Ralph Schiewe and plaintiff Janice Nechanicky moved the Court for an order granting these plaintiffs a new trial against the defendant limited to the issue of damages, or, in the alternative, a new trial on all issues on the grounds that the verdicts were inadequate and were against the clear weight of the evidence as to damages (R. 34-36). The motion for a new trial was denied (R. 38-39) and plaintiff Ralph Schiewe and Janice Nechanicky cross-appealed from the judgment and the order denying their motion for a new trial (R. 59-60).

The question involved on the cross-appeal is whether

the damages awarded to plaintiff Ralph Schiewe and Janice Nechanicky were so inadequate that they are entitled to a new trial. If this Court determines that they are entitled to a new trial, a secondary question is presented as to whether they are entitled to a new trial limited to the issue of damages or a new trial on all issues.

SPECIFICATIONS OF ERROR

1. The verdicts in favor of plaintiffs Ralph Schiewe and Janice Nechanicky were against the clear weight of the evidence as to damages and constituted an improper and inadequate award of damages.

2. The Trial Court erred in denying the motion of plaintiffs Ralph Schiewe and Janice Nechanicky for a new trial against the defendant limited solely to the issue of damages or, in the alternative a new trial on all issues.

SUMMARY OF ARGUMENT

I

Plaintiff Ralph Schiewe and plaintiff Janice Nechanicky are entitled to a new trial because the damages awarded to them are clearly inadequate and reasonable minds could not differ that their damages were far in excess of the amount awarded.

II

Plaintiff Ralph Schiewe and plaintiff Janice Nechanicky are entitled to a new trial limited to the issue of damages.

ARGUMENT

Bette Schiewe sustained a compression fracture of L-1 as a result of the airplane crash (Popp Dep. 5-6). A fusion was subsequently performed by Dr. Popp (Popp Dep. 24, Pltf. Ex. 14-A, B). The jury awarded Mrs. Schiewe the sum of $12,000.00.

Ralph Schiewe sustained a severe compression fracture of the 11th dorsal vertebra (Popp Dep. 55-58). This resulted in a natural fusing of three vertebrae in his back (Tr. 172-173). He had special damages of $685.80 (Tr. 36-38, 230, 310, 318). The jury awarded him the sum of $1,200.00 or general damages in the amount of $514.20.

Janice Nechanicky sustained a compression fracture of the first and second lumbar vertebra with some question as to a fracture of a third vertebra (Rodney Dep. 6, Popp Dep. 72, 74, 76). She incurred special damages in the amount of $827.85 (Tr. 123-124, 311, 319). The jury awarded her $2,000.00, or general damages in the amount of $1,172.15.

The verdict in favor of Bette Schiewe in the amount of $12,000.00 was low but reasonable minds could differ as to whether this was a proper amount. The verdicts in favor of Ralph Schiewe and Janice Nechanicky for substantially the same injuries were completely unreasonable and inadequate and we submit that reasonable minds could not differ that they were damaged far in excess of the amount awarded.

Plaintiff Ralph Schiewe was in the Klamath Valley

Hospital and the Bremerton Naval Hospital and was in a full body cast for approximately two months (Tr. 32-33). He sustained a compression fracture of the eleventh dorsal vertebra (Popp Dep. 55) and lost two teeth (Tr. 32). He left the Naval Hospital on leave approximately two and one-half months after the crash occurred (Tr. 33). He was not able to resume his normal job as a mechanic until April of 1960 (Tr. 34-35).

The Navy paid most of his medical bills and most of his lost wages but he did have special damages in the amount of $685.80 (Tr. 35-38, 230, 318). He was 36 years of age at the time of trial (Tr. 8) and had a life expectancy of 36 years (Tr. 327). His injuries resulted in limitation of his capacity to work and his general activities (Tr. 39-42). The injury to his back was described as a severe compression fracture of the eleventh dorsal vertebra with marked wedging or compression (Popp Dep. 55, 57). The entire body of D-11 sustained the fracture and there was a loss of 60 to 70% of vertical height in the vertebra (Popp Dep. 58). He sustained a permanent disability (Popp Dep. 61, 70).

Dr. Engelcke, defendant's examining doctor, was in substantial agreement. He testified that the vertebra was severely compressed and it resulted in a fusing of two other vertebrae to the vertebra which sustained the compression fracture (Tr. 166-167, 172-173). He testified that the vertebra was squashed about 50% (Tr. 172). He further testified that Mr. Schiewe sustained a permanent disability of 15% of the body considering the body as a whole (Tr. 171).

At the time of trial Janice Nechanicky was 23 years of age (Tr. 115) and had a life expectancy of 56 years (Tr. 327). She was in a full body cast for five or six weeks and was in a brace thereafter (Tr. 121-122). She sustained medical expenses and wage loss in the amount of $827.85 (Tr. 124, 311, 319). Her injuries also resulted in a limitation of activities (Tr. 124-125).

Medical testimony indicated that she sustained a compression fracture of the first and second lumbar vertebrae and possibly the twelfth thoracic vertebra (Rodney Dep. 6; Popp Dep. 72, 74). The first lumbar vertebra was compressed to one-half of its normal size (Rodney Dep. 9). She sustained a permanent injury (Rodney Dep. 13) and a permanent partial disability of 20% (Popp Dep. 75).

The Court may order a new trial on all or part of the issues and as to all or any of the parties. Rule 59 (a), Federal Rules of Civil Procedure, 6 Moore's Federal Practice, Sec. 59.06, p. 3759. The Trial Court may order a new trial when the verdict is against the weight of the evidence or when the damages awarded are inadequate. 6 Moore's Federal Practice, Sec. 59.08 (5), (6), p. 3814, 3821; 3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1304, p. 358.

The Court would seem to have the same power to order a new trial when the damages are inadequate as when the damages are excessive. If the damages shock the conscience of the Court, the verdict should be set aside and a new trial should be granted.

We believe that general damages in the amount of

$514.20 and $1,172.15 for compression fractures of the back and permanent disability are so unreasonable and so inadequate that justice was not done. We also believe that reasonable minds could not differ and that a new trial should be granted.

In this case liability has already been determined by the jury and the issue of damages is not interwoven with the issue of liability. Under such circumstances, a new trial should be limited to the issue of damages alone. *Yates* v. *Dann,* 11 F.R.D. 386, (D.C. Del. 1951); *Darbrow* v. *McDade,* 255 F.2d 610 (C.A. 3, 1958); Annotation, 29 A.L.R.2d 1199 "New Trial as to Damages Only", 6 Moore's Federal Practice, Sec. 59.06, p. 3759, Sec. 59.08, (6), p. 3821, 3 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1307, p. 383.

If the damages are considered to be in some manner interwoven with the issue of liability, plaintiff Ralph Schiewe and plaintiff Janice Nechanicky should be awarded a new trial on all issues.

CONCLUSION

Flying an airplane without a sufficient amount of fuel should constitute gross negligence or reckless conduct as a matter of law. This, along with the other conduct of the defendant, was in utter disregard of the rights of the plaintiffs. The Trial Court properly denied defendant's motions for a directed verdict and judgment notwithstanding the verdict.

The verdict and judgment in favor of Bette Schiewe

should be affirmed and Ralph Schiewe and Janice Nechanicky should be granted a new trial against the defendant on the issue of damages.

Respectfully submitted,

SAMUEL W. FANCHER,
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JACK L. KENNEDY,
Attorneys for Appellees and
Cross-Appellants Ralph Schiewe
and Janice Nechanicky.

CERTIFICATE OF COUNCIL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney

No. 18540

In the

United States Court of Appeals

For the Ninth Circuit

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Appellant,

vs.

RALPH SCHIEWE, BETTE SCHIEWE, his wife, and JANICE NECHANICKY, *Appellees.*

RALPH SCHIEWE and JANICE NECHANICKY,
Cross-Appellants,

vs.

ANTON J. STEINBOCK, dba Klamath Aircraft Service,
Cross-Appellee.

Appellant's Reply Brief and Answering Brief on Cross Appeal

Appeal from the United States District Court
for the District of Oregon

HONORABLE JOHN F. KILKENNY, Judge

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DAILY JOURNAL OF COMMERCE

APPELLANT'S REPLY BRIEF

SUBJECT INDEX

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Appellant's Reply Brief

ARGUMENT

1. From the rule that gross negligence is objectively determined,[1] plaintiffs, in utter disregard of the controlling law, conclude that gross negligence is the same as ordinary negligence and that the jury defines it (Ans Br 13, 23).

The Oregon rule is, however, based on § 500 of the Restatement of Torts:[2]

1. See defendant's opening brief (at 16). Plaintiffs err in asserting (Ans Br 23) that defendant has argued the case "from a subjective standpoint."
2. Three cases are involved, all of which expressly follow § 500 and comment c: *Williamson v. McKenna*, (1960) 223 Or 366 at 373, 391-392, 394-395, 398, 354 P2d 56; *Taylor v. Lawrence*, (1961) 229 Or 259 at 264-265, 366 P2d 735; *Nielsen v. Brown*, (1962) 75 Or Adv Sh 161, — Or —, 374 P2d 896 at 909-910.

> "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."[3]

Comment c states:

> "In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct."

This emphatically does not turn the case into an action for ordinary negligence, nor does it detract from the rule that recklessness is a state of mind. It merely makes necessary allowance for the irrationalities of individuals, but still requires, in every case, circumstances known or apparent to the defendant which create a

3. Counsel therefore errs in asserting (Ans Br 22) that the probability of harm is "the most important consideration" in deciding gross negligence questions. It is only one of the essential elements.

highly probable likelihood of serious injury, and an election to encounter it.

As stated by Justice O'Connell in *Williamson* (223 Or 366 at 389-390):

> "* * * To be sure, if reckless and gross misconduct is defined, not only in terms of the driver's *actual* perception of danger, but in terms of the danger which a reasonable man would perceive (as was recognized in *Turner v. McCready*, supra), our test becomes an objective one and the actor's mental state is not in truth a factor. But even here the test is in terms of a state of mind that may be inferred and this seems to be enough to afford us with a language which can serve as a rally point for judgment. * * *" (emphasis by the Court)[4]

2. It follows that the test is objective only in that the defendant need not subjectively appreciate the extreme risk if it is one any reasonable person would recognize. The case can be submitted only when there is evidence of facts, known or apparent to the defendant, creating an extremely dangerous situation which he elected to encounter. The evidence in this case failed to meet that standard.

a. The gasoline supply in the left tank.

There was no evidence of any facts known or appar-

4. See *Turner v. McCready*, (1950) 190 Or 28 at 54, 222 P2d 1010:
"* * * The element of recklessness may, under some circumstances, be inferred from evidence of the driver's conduct in the light of conditions and of what he *must* have known. * * *" (emphasis added)

ent to the defendant indicating that the left fuel tank was empty, or from which it could be found that he elected to encounter a risk that it might be. Plaintiffs simply ignore the thorough and careful inspection of the plane made by defendant before taking off, during which he made a visual inspection of the fuel supply (App Br 7-8, 10). They ignore the fact that the right tank was ½ full (App Br 10). It is their entire case that defendant may not have actually seen what he thought he saw when he looked in the tank and that he told Mr. Schiewe that the left fuel gauge "always" showed ¾ full.[5] The doubtful evidence of any "custom" at all to use a measuring device (which at most would raise only a question of ordinary care) was manifestly insufficient to create the kind of issue on which their claim must rest.[6]

There was, in short, simply no evidence that defendant ignored facts or dangers known or apparent to him and chose to expose his passengers to them. Under the guest statute, defendant is not the insurer of the gasoline supply, and plaintiffs have cited no authority supporting their claim (essential to their case) that he is.

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5. Note that the asserted defect (if any) was in the gauge, not the tank (Ans Br 13; Tr 22-23, 118).

6. The testimony of plaintiff Ralph Schiewe that one cannot measure the fuel by looking into the hole (Ans Br 13) was contradicted (Tr 226) and was limited by the witness to an examination made with one eye (Tr 46).

b. Defendant's conduct when the engine failed.

Plaintiffs' own testimony established that when the engine failed, defendant, who was frightened and upset, tried to get it going again (App Br 11). As shown before (App Br 27-29; see 19), defendant's conduct in the emergency does not constitute gross negligence under Oregon law. Defendant did not elect a course of danger—he became afraid and at most made a mistake.[7]

Plaintiffs argue that the jury found against defendant and suggest that the failure on takeoff of the plane's only engine was not an emergency (Ans Br 18). They do not refer to any evidence supporting this curious view, which misses the issue. The pilot's training to respond properly to an emergency could conceivably raise a question of ordinary negligence, but can scarcely turn defendant's momentary loss of control into recklessness.[8]

Secondly, plaintiffs erroneously assert that the emergency doctrine is inapplicable if defendant was guilty of prior negligence. This rule[9] is not applicable to gross negligence cases. In *Morris v. Williams*, (1960) 223 Or 50 at 59, 353 P2d 865 the court said:

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7. See defendant's testimony that he lost sight of the horizon and could not tell whether the nose was up or down or where the ground was (Tr 280-281, 293-294, 295).

8. The court erroneously told the jury that the emergency doctrine was not available if defendant was guilty of antecedent negligence. Indeed, the entire instruction on the doctrine related only to a standard of ordinary care, not gross negligence (Tr 326-327).

9. As previously pointed out (App Br 19).

> "* * * If it could be said that defendant may have been guilty of some negligence prior to the moment when he came to the scene of the accident it must be remembered that the charge against him is not that of ordinary negligence but of recklessness and gross negligence. The category of 'Inadvertent conduct, without more, will not constitute recklessness' includes action taken in an emergency. We know of no basis for believing that the defendant, as he drove along, displayed an I-don't-care attitude."[10]

3. Plaintiff's reference (Ans Br 25) to lower court cases from Georgia[11] (which they do not claim have the slightest bearing on their facts)—demonstrates the particular vice of their position. For both cases sustained claims of gross negligence[12] under the rule of Georgia law that the jury, not the court, defines gross negligence and classifies the defendant's conduct as slight, ordinary or gross negligence.[13] As previously pointed out, this is contrary to the controlling Oregon law (App Br 17). In *Burghardt v. Olson*, (1960) 223 Or 155 at 182, 349 P2d 792, 354 P2d 871 O'Connell, J., stated:

> "* * * The temptation here is to leave to the jury the difficult task of drawing a line between ordinary misconduct and reckless conduct. * * * But we are

10. See also 4 Blashfield Cyc Auto Law (1946) 483 (§ 2343) (Acts in emergency not gross negligence)

11. *Sammons v. Webb*, (1952) 86 Ga App 382, 71 SE 2d 832; *Citizens and Southern National Bank v. Huguley*, (1959) 100 Ga App 75, 110 SE 2d 63.

12. *Huguley* was before the court only on the pleadings.

13. *Sammons*, 71 SE 2d 832 at 840, *Huguley*, 110 SE 2d 63 at 67.

> charged with the duty of interpreting the guest statute and of establishing what we conceive to be the minimum amount of fault which can still characterize the conduct as reckless within the meaning of the statute. * * *"[14]

The law, as well as the facts, of the Georgia cases has no bearing on the present problem.

Plaintiffs quote language (Ans Br 14) from *Walthew v. Davis,* (1960) 201 Va 557, 111 SE 2d 784 that slight negligence in an automobile can be gross negligence in an airplane. In *Walthew*, however, the question was whether the Virginia common law rule that an automobile host is liable to his guest only for gross negligence should be applied in airplane cases. The court held that it should not, because airplanes were not included in the Virginia guest statute, and the differences between cars and planes made the automobile rule inapplicable to airplane cases in the absence of specific legislation. The case, therefore, was not concerned with legal gross negligence at all. Indeed, if the court's general reference to "gross" negligence had related to a legal standard of conduct, the case would have been differently decided, because the differences between planes and cars on which it relied would have been legally meaningless under the Virginia common

14. See also *Williamson v. McKenna*, supra, (1960) 223 Or 366 at 392-393, 354 P2d 56.

law rule. "Gross" negligence could then have carried the whole load.[15]

Counsel relies, finally, on cases which, on inspection, turn out to relate only to ordinary negligence (Ans Br 14-15, 19). Two[16] discuss inferences of negligence and *res ipsa loquitur*, neither of which is involved in this case. Two others[17] involved liability for ordinary negligence when a plane stalled or its engine failed. None involved gross negligence or suggested that the conduct there considered amounted to more than ordinary negligence. The failure to distinguish between ordinary negligence and recklessness, and the assumption that there is no difference between them except as the jury may choose to recognize it, is the wholly improper basis on which this case was tried and submitted.

Scarborough v. Aeroservice, Inc., (1952) 155 Neb 749, 53 NW 2d 902, which is relied on by plaintiffs to establish a duty to inspect peculiar to airplanes (Ans Br 13-15), utterly destroys their contention. The case in

15. The same remarks are applicable to plaintiffs' assertion (Ans Br 14, 19) that the standard of ordinary care is higher in airplane cases, for it is the entire range of ordinary negligence, as distinguished from recklessness, which the legislature exempted from liability under the guest statute.

16. *Lange v. Nelson-Ryan Flight Service, Inc.*, (1961) 259 Minn 460, 108 NW 2d 428 was thereafter disapproved by a majority of the Minnesota court, but was applied reluctantly as the law of the case (Minn 1962) 116 NW 2d 266, cert den (1962) 83 S Ct 508. The defendant's duty was that of a carrier to a paying passenger (108 NW 2d 428 at 432). Finally, there was no evidence of engine failure. In *Boise Payette Lumber Co. v. Larsen*, (CA 9 1954) 214 F2d 373 an inference of negligence was permitted, based on the fact that the pilot was not trained for the kind of flying in which he was then engaged.

17. *Robart v. Brehmer*, (1949) 92 Cal App 2d 830, 207 P2d 898; *Grimm v. Gargis*, (Mo 1957) 303 SW 2d 43.

fact related only to ordinary negligence; however, the defendant's duty to inspect was specifically held to be identical with that of an automobile owner. It was not higher, but the same (53 NW 2d 902 at 910; citing cases). The case does not distinguish, but strongly supports the applicability of the automobile guest cases cited by defendant.

4. Unsupported inferences from the record have crept into counsel's presentation.

a. The statement that defendant's insurer "altered" the left fuel tank (Ans Br 10) is less than frank. The investigator came three or four days after the accident and examined and tested the tank, in the course of which a piece was cut from it (Tr 4-5, 215). Counsel's implication of improper conduct is unsupported and improper.

b. Contrary to the suggestion in plaintiffs' brief (Ans Br 11), it nowhere appears that the left fuel line was tested after the accident (see App Br 13). It was established only that gasoline flowed freely from the right tank to the carburetor (see Tr 142-143). This is significant. While there was evidence that gasoline was not reaching the carburetor, the basic question is

whether there was evidence that this happened because the left fuel tank was empty. In this regard, the evidence was uncontradicted that gasoline was still running out of the tank 10-15 minutes after the accident, according to plaintiffs' own witnesses and as counsel admits (Ans Br 9-10).[18]

c. Counsel's attack on the fuel records (Ans Br 8-9) is unconvincing. The entry allegedly "squeezed in" above the 26 gallon gasoline entry for August 12 reads "line flush," which means nothing to this case. There was not the slightest question of the "authenticity" of the record. Counsel asked the gas boy (Fagg) some questions on cross examination and received negative responses (Tr 266-268); he apparently relies on the questions, not the answers, to support his contentions.

Nor were the daily flight records "suspicious". The reference to "Gordon" had nothing to do with this plane.[19] The entry for a 7 hours, 50 minutes flight related to a prior flight to British Columbia (Tr 299), following which 36 gallons were put in the tank on August 10

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18. The testimony of Mr. Withers that it was "possible" he had run the left tank down is not, under Oregon law, substantial evidence that he did so, and the duration of his brief flights is substantial evidence that he did not (Ex 8).

19. Note counsel's reference (Ans Br 8-9):

"* * * which apparently refers to this airplane."

(Tr 266, 299; Ex 8a). Another 26 gallons were put in on the 12th, filling both tanks (Tr 266, 268).

d. Contrary to counsel's assertion (Ans Br 16), defendant did not "admit" he was at the controls and was flying the plane (Tr 292).

CONCLUSION

The evidence simply did not approach the minimum proof of gross negligence under Oregon law. There was no evidence that defendant's inspection of the fuel tank was substandard, or that he had actual or apparent knowledge of facts indicating that the fuel supply was or might be inadequate. In any case, the evidence was conclusive that there was gasoline in both tanks.

If defendant made a mistake when the engine quit, according to the undisputed evidence, he did so in the course of attempting to meet the emergency which arose when the engine failed and he lost sight of the horizon. There was no evidence in either case that he chose to expose his passengers to any risk. As stated by Goodwin, J., in *Bland v. Williams*, (1960) 225 Or 193 at 199, 357 P2d 258:

> "The rule in *Williamson v. McKenna* precludes holding that there was evidence of recklessness when there was merely evidence of negligence. * * *"

The judgment should be reversed and judgment entered in favor of defendant.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH & DEZENDORF

JOHN GORDON GEARIN

JAMES H. CLARKE

Attorneys for Defendant-Appellant Anton J. Steinbock

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney

ANSWERING BRIEF ON CROSS APPEAL

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TABLE OF CASES (Cont.)

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vs.

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Cross-Appellee.

Appeal from the United States District Court
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HONORABLE JOHN F. KILKENNY, Judge

Answering Brief on Cross Appeal

JURISDICTION

Defendant and cross-appellee Anton J. Steinbock adopts his prior jurisdictional statement (App Br 1-2).

STATEMENT OF THE CASE

Defendant adopts his prior statement of the case (App Br 2-4) as supplemented herein

Ralph Schiewe

Mr. Schiewe returned to work full time as a radio operator on November 1 (Tr 34, 37) and has worked steadily since then (Tr 52). He resumed his regular job

as a mechanic on April 1 (Tr 34, 39) and has received wage increases (Tr 59-60). He was on Navy pay while he was away from his job (Tr 52) and received vacation time and sick leave (Tr 52). Most of his medical expenses were paid by the Navy (Tr 35; Ans Br 30).

While he complained at the trial of continuing pain (Tr 39-42; see Tr 162), he admitted that he had recently taken a Navy cruise (Tr 53) and maintains a large yard (Tr 59). The body cast, mentioned by counsel, was uncomfortable, but gave him "no real difficulty" (Tr 35).

His complaints of continuing back pain are subjective (Tr 175), and his discomfort, if any, is not in the injured part of his back (Tr 163). The lumbosacral spine, where he located the pain, is normal (Tr 167, 168). Dr. Engelcke found no muscle spasms, and reflexes are normal; there is no nerve involvement (Tr 164-165). He has a normal range of motion (Tr 168, 174), and even his subjective symptoms are "very mild" (Tr 169). He made an "excellent" recovery (Tr 169).

Janice Nechanicky

Miss Nechanicky also recovered completely. While she complained of pain to Dr. Engelcke (Tr 188; see Tr 125-126), he testified that her disability is in fact "minimal" and her complaints may disappear (Tr 190). He found a single slight compression (Tr 189) and, con-

trary to counsel's statement (Ans Br 31), there is no other break or compression whatever (Tr 191). There is no muscle spasm (Tr 189). Her disability, if any, is "very slight" (Tr 192).

She, too, had no particular trouble with the body cast (Tr 122). She was away from work for one month, and for two weeks thereafter worked two hours each day (Tr 123). Since then, she has worked full time, except when she is unemployed (Tr 124, 127).

QUESTION PRESENTED

Is there support in the record for the decision of the trial judge?

SUMMARY OF ARGUMENT

1. Cross-appellants (hereafter called plaintiffs) were adequately compensated for their injuries, which were sought to be magnified at the trial.

2. The record supported the decision of the trial judge, which is therefore conclusive. Plaintiffs do not assert legal error or even charge that the trial judge's ruling constituted an abuse of discretion. The ambiguous, subjective and conflicting evidence was carefully considered by the trial judge before he decided the motion. His decision was proper and final.

3. A retrial could not be limited to the issue of damages.

ARGUMENT

1. The record compelled the trial judge to deny the motion of plaintiffs and fully supports his decision.

a. In their motion and in this Court, plaintiffs claim only that the sums awarded them by the jury were inadequate. They do not claim that the jury awards were the result of passion or prejudice or that there was any misconduct of counsel, jurors or witnesses. No complaint is made of the instructions on damages or that the trial judge did not perform his job dispassionately and fairly.[20] Nowhere do they assert that the denial of their motion amounted to an abuse of discretion.

b. In attempting to build up their injuries, counsel relies almost exclusively upon plaintiffs' testimony and that of their own examining and treating doctors, none of which was binding on the jury and, as pointed out by the trial judge, was subject to "considerable difference of opinion between the doctors" (Tr 355).

c. The jury considered each claim separately and brought back a distinct verdict for each plaintiff. Mrs. Schiewe's award was apparently considered adequate.

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20. The judge was of the view that plaintiff Ralph Schiewe was guilty of contributory negligence as a matter of law (Tr 354); there is, however, no indication that this ruling affected his decision on the motion.

d. The trial judge gave careful attention to plaintiffs' motion before exercising his discretion. He expressed no dissatisfaction with the amount of the verdicts, and the grounds of his decision are not criticized in any way.[21]

> "* * * There was a considerable difference of opinion between the doctors on the injuries, particularly to Ralph Schiewe and Miss Nechanicky, and particularly the attending doctor, who was called by the defendant, and said that they had a very good result. The evidence shows that they were back at work within a very short period of time and earning, you might say, the same wages as they were earning before, and they have so continued to earn such wages.
>
> "Under those circumstances I believe that the trier of the facts could have arrived at these figures which were inserted in the verdicts by the jury. I am not going to set the verdicts aside.
>
> "The motion for a new trial is denied." (Tr 355-356)

e. Considering the evidence referred to by counsel and that which he has ignored, the jury could conclude that there was a deliberate effort by these plaintiffs to magnify their injuries at the trial. It was fully entitled to disbelieve their subjective complaints, as well as the enthusiastic testimony of their doctors. While the acci-

21. Plaintiffs nowhere claim that the trial judge's decision was an abuse of his discretion. They incorrectly treat the case as one in which this Court can review the amount of the jury's verdicts.

dent probably caused them discomfort and inconvenience, their injuries in fact healed quickly, and they sustained little loss; both made excellent recoveries and now lead normal lives. Both were awarded sums substantially in excess of their claims for special damages, in amounts which the jury, which saw them and heard them testify, considered adequate compensation for their slight residual difficulty (if any) and their discomfort. The evaluation of the evidence was exclusively the function of the jury, subject only to the trial judge's discretionary authority to review the verdicts. Both decisions were properly adverse to plaintiffs' claim for large damages.

2. This Court's review of the trial judge's denial of the motion is limited to legal error, and plaintiffs assert none. If, as here, the trial judge's decision is supported in the record, it is final and cannot be set aside.

In *Neese v. Southern Railway Co.*, (1955) 350 US 77, 76 S Ct 131, 100 L Ed 60 the Supreme Court reversed a judgment of the Fourth Circuit which ordered a new trial after the trial court refused to grant one for excessive damages. The Supreme Court said:

> "* * * as we view the evidence we think that the action of the trial court was *not without support in the record, and accordingly* that its action should not have been disturbed by the Court of Appeals." (emphasis supplied)

In *Southern Pac. Co. v. Guthrie*, (CA 9 1951) 186 F2d 926 at 932, cert den (1951) 341 US 904 this Court held that the trial court's refusal to allow a new trial for excessive or inadequate damages is limited to cases where (1) there is collateral legal error (none is charged in this case); or (2) the verdict is so "monstrous" or "grossly excessive" as to require reversal of the lower court's ruling for abuse of discretion. The discretion, however, is exclusively that of the trial judge.

> "When the trial court is presented with a motion for a new trial grounded on a claim of an excessive verdict its power to deal with the motion is not limited to questions of law. The same power and duty which the trial judge has to set aside any verdict and grant a new trial when he is of the opinion the verdict is against the weight of evidence, is that which the trial court frequently exercises in ordering a new trial, or in conditioning denial of a new trial on a remittitur because, in the opinion of the court, the amount of the verdict is against the weight of the evidence. But this power and duty belongs exclusively to the trial judge. It is not for us to give directions in such a case, even although he may have declined to take action, such as we consider we would have done had we been in his place. * * *" (at 932-933)[22]

22. See also *Bradley Min. Co. v. Boice*, (CA 9 1951) 194 F2d 80 at 83; *Siebrand v. Gossnell*. (CA 9 1956) 234 F2d 81 at 94. This Court has previously applied the "abuse of discretion" rule. *Cobb v. Lepisto*, (CCA 9 1925) 6 F2d 128 at 130 (contract case); *Department of Water (etc.) v. Anderson*, (CCA 9 1938) 95 F2d 577 at 586 (personal injury case; rule recognized). Whether any review of the trial judge's ruling is permissible, especially since *Neese*, is still in doubt. See *Dagnello v. Long Island Rail Road Company*, (CA 2 1961) 289 F2d 797 at 801-802.

On the present record, the trial judge had little choice. The jury's awards, while small, adequately recognized and translated all of the elements of loss into dollar figures and expressed their findings based on the evidence. In *Veelik v. Atchison, Topeka & Santa Fe Railway Company*, (CA 9 1955) 225 F2d 53 at 54 ($2,000 verdict for injured railway employee) this Court said:

> "* * * While a much higher verdict might have been justified on the evidence if the triers of fact had chosen to return a greater amount, there was no basis for granting a new trial or setting aside the award which was made. * * *"

In *Veelik*, as here, the evidence was largely subjective, and permanent disability was not established; nor were there circumstances indicating passion or prejudice of the jury.

> "Many of the devices suggested by advocates of the 'adequate recovery' were attempted in the trial of this case. But the jury must be trusted in the absence of legal error. If the courts are to uphold some of the large verdicts which are returned, these tribunals should also respect their findings when they choose to be moderate." (at 55)

In *Arramone v. Prowse*, (CA 9 1956) 235 F2d 454

at 455 ($6,000 verdict for badly scarred face) Judge Healy said:

> "* * * We can only assume that the verdict represents an honest and conscientious appraisal by the jurors of the amount fairly to be awarded as general compensation. Our power to interfere with the court's denial of a new trial is in any event very limited. Certainly we cannot say that its order in this respect constituted an abuse of discretion, or that it amounted to an error of law."

In *Bainbrich v. Hammond Iron Works*, (CA 10 1957) 249 F2d 348 at 349-350 the court said:

> "* * * The record here discloses that the case was tried in a fair and dispassionate manner, and there is no indication whatsoever that the jury was influenced by passion, prejudice or by any other unlawful cause. It is said that the undisputed evidence as to the extent of the injuries to the plaintiffs, permanent and otherwise, was such as to indicate that the verdict was palpably and grossly inadequate. This question, we think, was one of fact, to be determined by the trial court within its discretion, and is not reviewable here. * * *"[23]

There are, in addition, specific circumstances in this case which preclude review:

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23. See also *Cross v. Thompson*, (CA 6 1962) 298 F2d 186; *Bryant v. Mathis*, (CA DC 1960) 278 F2d 19; *DeFoe v. Duhl*, (CA 4 1961) 286 F2d 205 (concussion and related injuries; special damages of $624.30, verdict $699); *Gorman v. Nelson*, (CA 5 1959) 263 F2d 116 (alleged "multiple and serious injuries"; special damages $570, verdict $1,000); Anno: 16 ALR 2d 393 (1951).

a. The jury was not bound by the testimony of plaintiffs or their doctors, and the extent and value of plaintiffs' claimed pain and suffering are entirely for the jury. *Springer v. J. J. Newberry Co.*, (DC Pa 1951) 94 F Supp 905, aff'd (CA 3 1951) 191 F2d 915 (fractured wrist causing 45% permanent disability; $750 verdict affirmed).

b. As the trial judge pointed out, the evidence of plaintiffs' injuries was conflicting. This conflict supports its decision and precludes review. *Friedman v. Phillips*, (CA DC 1961) 287 F2d 349; *Dadiskos v. Shorey*, (CA 2 1956) 229 F2d 163 at 164.

c. The trial judge gave careful consideration to plaintiffs' motion for a new trial. In *Lebeck v. William A. Jarvis, Inc.*, (CA 3 1957) 250 F2d 285 at 288 the court said:

> "* * * Nothing appears or has been suggested to indicate that in so ruling the court acted arbitrarily. Rather it seems clear that, weighing considerations pro and con, the trial judge exercised his best judgment as to the possible size of a rational verdict in the light of all of the evidence. And that is the extent of our concern as a reviewing court. For our inquiry goes only to the question whether the trial court has exercised discretion in a judicial manner in disposing of this aspect of the motion for a new trial. * * * Beyond that, it is not our privilege to substitute our judgment for that of the trial court as to the maximum amount which will provide fair recompense for injuries which cannot be equated

in any mathematical way with any number of dollars. * * *"

3. The alternative motion of plaintiffs in the trial court was for a new trial limited to damages or for a new trial of all issues, including liability (R 34). Since the motion was denied, the question of the issues which might be retried was not decided below. In *Grimm v. California Spray-Chemical Corp.*, (CA 9 1959) 264 F2d 145 at 146 this Court affirmed an order for a retrial of issues of both liability and damages in a case where the verdict was for less than the special damages alone. This Court held that "a retrial of the damage issue alone would be grossly unfair" to the defendant.

It cannot be assumed that the jury was wholly satisfied with plaintiffs' proof of liability. The issues may not be independent, and a retrial therefore could not be limited to the issue of damages.[24]

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24. *Haug v. Grimm*, (CA 8 1958) 251 F2d 523 at 527-528; *Southern Railway Company v. Madden*, (CA 4 1955) 224 F2d 320 at 321; *Southern Railway Company v. Madden*, (CA 4 1956)) 235 F2d 198 at 204; *Schuerholz v. Roach*, (CCA 4 1932) 58 F2d 32 at 33-34, cert den (1932) 287 US 623; *Mutual Ben. Health & Accident Ass'n v. Thomas*, (CCA 8 1941) 123 F2d 353 at 356; Anno: 85 ALR 2d 9 at 26-34 (1962).

CONCLUSION

The jury adequately compensated Ralph Schiewe and Janice Nechanicky for their injuries, and the cross appeal is without merit.

Respectfully submitted,

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Attorneys for Defendant and Cross-Appellee Anton J. Steinbock

CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Attorney

No. 18541

In the
United States Court of Appeal
For the Ninth Circuit

R. W. AGNEW,

Plaintiff and Appellant,

vs.

RICHARD W. MOODY, MACK E. RHODES, CHARLES B. RUSSELL, ELBERT E. STANFORD, B. C. ESTES, WILLIAM H. PARKER, RICHARD LASKIN, ROGER ARNEBERGH, PHILIP GREY, EDWARD L. DAVENPORT, ROBERT L. BURNS, WILLIAM B. BURGE, WILLIAM DORAN, NORMAN TULIN, HOWARD H. SCHMIDT, CHARLES HURD, CLARA CLAPP, G. VELLA CONSTRUCTION COMPANY, a corporation, DOMINIC GIANGREGORIO CONCRETE CONSTRUCTION COMPANY, a corporation,

Defendants and Appellees.

Appellees' Brief

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Defendants and Appellees.

No. 18541

Appellees' Reply Brief

STATEMENT OF THE CASE

The record before this Honorable Court discloses that the plaintiff in error, Mr. Agnew appeals from:

(1) the order of November 5, 1962 dismissing the Amended Complaint with prejudice as to all defendants except defendants MOODY and RHODES, and as to defendants MOODY and RHODES dismissing

the Amended Complaint without prejudice with leave to plaintiff to amend within twenty days; and from

(2) the Order dismissing the action, entered on February 12, 1962 (Clerk's transcript, page 122).

This action arose when the appellant received a traffic ticket issued by the Los Angeles Police Department. The matter went to trial in the Los Angeles Municipal Court before the defendant HOWARD SCHMIDT, Judge of said court. After a lengthy trial, the appellant was convicted and an appeal was taken to the Appellate Department of the Superior Court wherein the appellant urged each point herein raised by the Amended Complaint. The Appellate Department unanimously affirmed the Judgment of conviction without an opinion. Prior to execution of sentence, Mr. Justice Douglass of the United States Superior Court issued a stay order pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court.

The present action was filed during the course of the Municipal Court proceedings. This Honorable Court is respectfully requested to take Judicial Notice of the records and files of the Los Angeles Municipal Court Action No. 760466 entitled *People of the State of California v. R. W. Agnew.* Said records are currently before the United States Supreme Court in the aforementioned Petition for Writ of Certiorari in *Agnew v. California.*

The Amended Complaint in the case at bar clearly discloses that the appellee HOWARD H. SCHMIDT is a Judge of the Municipal Court of Los Angeles Judicial District. Appellee NORMAN TULIN is an official Court Reporter of said Municipal Court. (Clerk's transcript, page 2) Both aforementioned appellees appeared in the case at bar by moving to dismiss the amended complaint. The appellees CLARA CLAPP and CHARLES HURD are the duly appointed Clerk and Bailiff of said court. The Amended Complaint was dismissed before either defendant appeared.

The issues presented as to appellees SCHMIDT and TULIN are:

(1) whether the Amended Complaint violated Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE. [28 U.S.C.A.]; and

(2) whether or not they are entitled to immunity from prosecution.

I.

THE DISTRICT COURT PROPERLY DISMISSED THE AMENDED COMPLAINT SINCE SAID COMPLAINT VIOLATED RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE [28 U.S.C.A.]

Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE requires ". . .

> (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . ." [28 U.S.C.A.]

In the case at bar the appellant R. W. Agnew filed an Amended Complaint consisting of fifty-five pages containing eighty-one paragraphs. The complaint rambled on in narrative fashion and attempted to set forth three causes of action under the Federal Civil Rights Act, to wit: 42 USC 1983; 42 USC 1985; and 42 USC 1986, against nineteen defendants.

A. It is elementary that only well pleaded and material allegations of a complaint are assumed to be true, while Conclusions of law and unwarranted deductions of fact are not admitted on the hearing of a motion to dismiss.

John and Sal's Automotive Service Inc. v. Sinclair Refining Co., D.C.N.Y., 1959, 177 F Supp. 201.

B. Judicial notice may be taken of a fact to show that a complaint does not state a cause of action.

Sears, Roebuck and Co. v. Metropolitan Engravers, Limited, C.A. 9th Circ. Cal. 1957, 245 F. 2d 67;

Yudin v. Carrol, D.C. Ark., 1944, 57 F. Supp. 793.

The District Court was entitled to look to the records and files of the Los Angeles Municipal Court in considering the appellee's motion to dismiss.

C. The Amended Complaint filed by the plaintiff in error is a clear violation of the rule that a short and concise statement must be pleaded.

Federal Rules of Civil Procedure, Rule 8 [28 U.S.C.A.].

In ruling on the Motions to Dismiss in the case at bar, the court said,

"THE COURT: Well, Mr. Agnew, I have gone over the complaint, the pleadings. I am going to dismiss the complaint in its entirety because you have failed to comply with Rule 8, in failing to file a short and plain statement. Also I am going to dismiss with prejudice as to all defendants other than Moody and Rhodes, who are the police officers who stopped you, and I will dismiss without prejudice as to them. You may be able to state a cause of action against the officers who stopped you, but you certainly cannot state a cause of ac-

> tion against a judge, the United States Attorney, or the court reporter, or the marshal, or anybody else. The action will be dismissed, the complaint will be dismissed in its entirety for the failure to comply with Rule 8, Subdivision A. The dismissal will be with prejudice to all defendants except the two police officers, Moody and Rhodes, and that will be without prejudice, so if the plaintiff wants to file a complaint against Moody and Rhodes and comply with the rule, I will be glad to hear it." (Rep. Tr., page 14, l. 17 to page 15 l. 10).

A failure to comply with Rule 8 *Federal Rules of Civil Procedure* [28 U.S.C.A.] makes the complaint in issue subject to a motion to dismiss. As was held in *Condol v. Baltimore and Ohio Railroad Co., et al.*, C.A.D.C., 1952, 199 F. 2d 400 at page 402:

> "Condol's complaint fills twelve pages of the printed appendix which is before us and contains 45 numbered paragraphs. It is a tedious recital of evidential matter and falls far short of being the crisp statement which for the Rule requires. In a case as simple as this one, there is no justification for such a complaint and a defendant should not be required to plead to it."

Taylor v. United States Board of Parole C.A.D.C. 1951, 194 F. 2d 882;

McCann v. Clark C.A.D.C. 1951, 191 F. 2d 476.

So too, the appellant's complaint not only violated the rule of the *Condol* case (supra) but also disclosed

the fact that the majority of defendants were entitled to Immunity.

The Amended Complaint could not have been amended further so as to rob these defendants of the immunity granted to them. Therefore, the District Court in exercising its discretion, had every right to dismiss the Amended Complaint with prejudice as to all parties except MOODY and RHODES. Leave to amend need not be granted where such would serve no useful purpose.

In *Lone Star Motor Import Inc. v. Citroen Cars Corp.,* C.A. 5th Circ. 1961, 288 F. 2d 69 the court held at page 77:

> "In most of such cases the unsuccessful plaintiff or defendant must be given an opportunity of filing an amendment *unless it appears reasonably certain under the accepted test no evidence is available to make out a claim or defense."* (Emphasis Added)

The District Court, in dismissing the Amended Complaint in the case at bar, informed the appellant why the said complaint was being dismissed (Clerk's transcript, page 120). This case is consistent with the holding in *Bananno v. Thomas,* C.A. 9th Circ. 1962. 309 F. 2d 320 where this Honorable court said at page 322:

> "Moreover, if this complaint was dismissed for failure to state a claim on which relief could be granted, leave should have been granted to amend

> unless the court determined that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. We find no indication of such a determination in this record. It is of no consequence that no request to amend the pleading was made in the district court. *Sidebotham v. Robison,* 9 Cir., 216 F. 2d 816, 826."

The record in the present action clearly indicates that the appellant could not possibly cure the defects contained in the Amended Complaint.

II.

APPELLEES SCHMIDT AND TULIN ARE ENTITLED TO JUDICIAL IMMUNITY.

A. As to the Appellee HOWARD H. SCHMIDT, the case authority is legion to the effect that judges of courts are entitled to judicial immunity.

The affidavit of HOWARD H. SCHMIDT discloses that said appellee is a Judge of the Municipal Court of Los Angeles Judicial District (Clerk's Transcript, Page 78). Said appellee is referred to in the Amended Complaint in the case at bar as the Judge who presided in appellant's criminal trial.

The immunity granted to Judges of Courts extends to causes of action based on the Federal Civil Rights Act [42 U.S.C.A.].

In *Perkins v. Rich,* D.C. Del. 1962, 204 F. Supp. 98 Senior District Judge Rodney said at page 101:

> "The plaintiff in some light way indicated reliance upon the Civil Rights Act, 42 U.S.C.A., 1981, 1983. Without at all conceding that the indicated facts show any cause of action under the cited Act, I am of the opinion that the principle of judicial immunity has equal application under that Act as in other appropriate cases . . . "

An even stronger holding is found in *Rudnicki v. McCormack,* D.C. R.I., 1962, 210 F. Supp. 905 at page 907. There it was held:

> "Insofar as the judicial defendants are concerned, it has long been settled that judges, both state and federal, are immune from civil liability for their judicial acts (cases cited). This immunity extends to suits, such as the present ones, for alleged deprivation of civil rights under the Civil Rights Act . . . "

The cases of judicial immunity turn on whether or not the named defendant judge was exercising or performing a "judicial function" at the time the alleged cause of action arose. If the defendant was so performing, then immunity attached.

In *Yates v. Village of Hoffman Estates,* D.C. Ill. 1962, 209 F. Supp. 757, the District Court brought the issue of judicial immunity into sharp focus, and set down the doctrine of "judicial function."

The court held at page 747:

> "A judge must be free from concern that civil liability will be sought by an unsuccessful litigant

who ascribes his misfortune to judicial malice and corruption. *Bradley v. Fisher,* 1871, 80 U.S. (13 Wall) 335, 348, 20 L. Ed. 646. Similarly, judicial independence requires immunity from civil liability resulting from the multitude of procedural decisions which must necessarily be rendered in each case heard. (c.f. 68 *Harv. L. Rev.* 1229, 1237, (1955)), even though a particular decision is erroneous (c.f. *Ryan v. Scoggin,* 10th Cir. 1957, 245 F. 2d 54, 58 (dictum)), or even malicious (cases cited).

"However, not every action by a judge is in exercise of his judicial function. For example, it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse. . . . "

The appellant urges three points in support of the proposition that the appellee SCHMIDT is not entitled to judicial immunity:

1. That the Civil Rights Act recognizes no judicial immunity; and
2. That even if the Civil Rights Act has not abrogated the Common Law, Judicial Immunity, there is no immunity for "extraordinary" wrongful acts; and
3. That this appellee lost jurisdiction upon the filing of a Declaration of Bias and Prejudice under California Code of Civil Procedure, Section 170, Subdivision 5.

The appellant's first point, to wit: That the Civil Rights Act does not recognize judicial immunity has

been answered heretofore, and said point on appeal is clearly without merit.

The appellant's second point, to wit: That the principle of judicial immunity does not cover "extraordinary" acts, appears to be a creature of the appellant's own imagination. The appellant in Appellant's Opening Brief, page 39, Lines 18-23 states the following:

> "There are cases which deride the *Picking* case, supra, 151 Fed. 2d, 240 and make claim that complete judicial immunity even for extraordinary wrongful acts is a 'necessity' for operation of the courts. Then, *this is, of course, especially as to extraordinary wrongful acts simply not so. . . .* " (Emphasis added).

This appellee submits that there is no authority for said proposition.

Appellant's third point, to wit: That the appellee HOWARD H. SCHMIDT lost jurisdiction upon the filing of a Declaration of Bias and Prejudice under the Code of Civil Procedure, Section 170, Subdivision 5 is likewise without merit. The case law stands for the proposition that if a judge has jurisdiction of subject matter of the action and jurisdiction of the person of the defendant, then immunity attaches once and for all, and even wrongful decisions will not deprive said judge of the immunity to which he is rightfully entitled.

> *Yates v. Village of Hoffman Estates,* Ill. (supra).

By way of illustration this appellee wishes to point out to the court the appellant's statement contained in the Appellant's Opening Brief at the last line of Page 21 over to Page 22, Line 6, wherein the following is found:

> "It would be appropriate to point out also that the Reporter's Transcript discloses a bias and prejudice bordering on animosity on the part of Judge Westover toward plaintiff, because, apparently, plaintiff had the gall to apear before the judge in his court in *propria persona,* and in response to questions of the judge make answer as to opinion of the law as a layman. . . ."

For other cases treating the subject of Judicial Immunity, see:

Saier v. State Bar of Michigan, C.A. 6th Cir. 1961, 293 F. 2d 756;

Yaselli v. Goff, C.A. 2d Cir. 1926, 12 F. 2d 396;

Nicklaus v. Simmons, D.C. Neb. 1961, 196 F. Supp. 691;

Cahn v. International Ladies' Garment Union, D.C. Penn. 1962, 203 F. Supp. 191.

B. Appellee NORMAN TULIN, an official Court Reporter is entitled to Judicial Immunity.

A position of Court Reporter partakes the nature of a public office and as such any duties imposed on such office are owed to the public at large and not to private individuals.

The attention of the Court is directed to the case of *Peckham v. Scanlon,* C.A. 7th Cir. 1957, 241 F. 2d 761 wherein is found a set of facts much the same as those in the case at bar. The plaintiff in the *Peckham* case, (supra) sought to recover under the Civil Rights Act, (42 U.S.C.A.) 1983 and 1985. One of the offenses alleged was that the Court Reporter, one Kaylor, failed and refused to prepare a transcript for a criminal defendant. The court stated at page 763 "It is also our view that Kaylor is immune from prosecution under the Civil Rights Act."

CONCLUSION

This Honorable Court is respectfully requested to affirm the order of the District Court dismissing the action as to the Appellees SCHMIDT AND TULIN. This Court is further requested to affirm the Order of the District Court dismissing *sua sponte* the action as to Defendants HURD and CLAPP. The appellees request also that they be granted costs incurred herein.

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Deputy County Counsel
Attorneys for Appellees
Schmidt and Tulin.

No. 18541

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. W. AGNEW,

Plaintiff and Appellant,

vs.

RICHARD W. MOODY, MACK E. RHODES, CHARLES B. RUSSELL, ELBERT E. STANFORD, B. C. ESTES, WILLIAM H. PARKER, RICHARD LASKIN, ROGER ARNEBERGH, PHILIP GREY, EDWARD L. DAVENPORT, ROBERT L. BURNS, WILLIAM B. BURGE, WILLIAM DORAN, NORMAN TULIN, HOWARD H. SCHMIDT, CHARLES HURD, CLARA CLAPP, G. VELLA CONSTRUCTION COMPANY, a corporation, DOMINIC GIANGREGORIO CONCRETE CONSTRUCTION COMPANY, a corporation,

Defendants and Appellees.

APPELLANT'S CLOSING BRIEF

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TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS

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THE POSITION OF APPELLEES CONCERNING THE MATTER OF A SHORT AND PLAIN STATEMENT OF CLAIM.

Counsel for appellees spend some time in their briefs complaining for the first time on appeal that the amended complaint is not a short and plain statement of a claim. Appellees waived the point in the lower court by failure to assert it. The only grounds made by appellees in the lower court as a reason to dismiss the amended complaint was that it failed to state a claim upon which relief could be granted. It was Judge Westover who seized upon a

proposition that the amended complaint did not constitute a short and plain statement of a claim.

In Valle v. Stengel, 176 F. 2d 697, a civil rights case, the complaint had consisted of 26 counts, unusually long and prolix; among other matters therein was charged that Chief of Police Stengel had "aided and abetted" the private corporation defendant in denying the plaintiff his federally protected rights. The district court had dismissed the complaint, but on appeal the order of dismissal was reversed.

In United States v. Crown Zellerbach Corp., 141 F. Supp. 118, the Court stated at page 131:

> "...In so far as the complaint sets forth evidentiary matters, they are relevant to the controversy and provide a background for an understanding of the charges. ..."

And so it is in the amended complaint at bar that the matter is set forth to enable the court and the defendants to fully understand what is being charged.

In McCoy v. Providence Journal Co., 190 F. 2d 760, the complaint was argumentative, prolix, redundant and verbose, and had attached to it and labeled as exhibits lengthy letters and affidavits containing evidentiary matter including purported statements made by some defendants. The complaint was not so badly drawn that the defendants were prevented from making their defense. The matter

Court on appeal affirmed the judgment and concluded that any mere error of the complaint such as departure from the rule providing for short and plain statement of a claim would be treated as harmless.

None of the cases cited by appellees are in point which approve action such as the action of the lower court in throwing appellant out of court for his refusal to 'voluntarily' waive his claims against the other defendants by the act of further amending the complaint and complaining only against Moody and Rhodes. Even if it be held that the amended complaint was not a short and plain statement of a claim it still would have been the right of appellant to have further amended his amended complaint to cure any such defect and to assert his claim against all the defendants; but as to this right to further amend, if such course is thought was necessary, the lower court by its order dismissing all defendants other than Moody and Rhodes made it impossible for appellant to exercise the right.

THE POSITION OF APPELLEES ON THE QUESTIONS INVOLVED.

A. Question number 11 appearing on page 10 of appellant's opening brief has not been spoken of at all by appellees; they merely say that appellant should have 'obeyed' Judge Westover and filed a further amended complaint only as against Moody and Rhodes and leaving

out every claim against any other defendant. For the appellant to have done so would result in voluntarily, himself, waiving his just claims against the other defendants- something he did not have to do.

B. It is apparent from the briefs of appellees they do not squarely meet the issue raised here as to whether defendants could be held liable on a cause of action for "conspiracy". The very case they cite that of Kenney v. Fox, 232 F. 2d 288, holds on this point against them, and as well does McShane v. Moldovan, 172 F. 2d 1016; Valle v. Stengel, 176 F. 2d 697, hold a cause of action for conspiracy defeats a defense of immunity. cf. Burt v. City of New York, 156 F. 2d 791.

THE POSITION OF APPELLEES THAT ALL DEFENDANTS, EXCEPT MOODY AND RHODES, HAVE IMMUNITY FROM SUIT.

The brief of the County Counsel says (p.7):

> "The Amended Complaint could not have been amended further so as to rob these defendants of the immunity granted to them."

But, the objection of appellant is that none of the defendants had any immunity from suit for the corrupt and extraordinary wrongful acts committed against appellant.

The Civil Rights Act clearly spells out who are liable to suit for wrongful acts specified therein. The

Act says "every person" is liable. Following this clear statutory provision (Picking v. Pennsylvania R. Co., 151 F. 2d 240; Morgan v. Null, 117 F. Supp. 11; Sharp v. Lucky, 252 F. 2d 910; Ghadiali v. Deleware State Medical Society, 28 F. Supp. 841; Burt v. City of New York, 156 F. 2d 791; Cf. Ex parte Virginia, 100 U. S. 339, 346-348), the courts have, prior to Monroe v. Pape, 365 U. S. 167 and Baker v. Carr, 369 U. S. 186, attempted to dilute the legislative will by the judges spinning their own philosophy into the fabric of the law.

Baker v. Carr, supra, 369 U. S. 186, said:

> "...The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. ..."

Cf. Marshal v. Sawyer, 301 F. 2d 639.

Mr. Justice Douglas in his dissent in Tenney v. Brandhove, 341 U. S., stated at 382-383:

> "...But when a committee [of the legislature] perverts its powers, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends. ..."

Lord Coke expressed the proper thought when he informed King James that there was a law above the King.

To adopt the position of appellees as to their asserted immunity from suit would effectively bury the Civil Rights Act and thereby destroy the security of the citizens which the Act was adopted to preserve. To pronounce such an awful edict destroying that which was given birth for security and preservation of liberty is but to back-track a century when in Congress Mr. Porter of Virginia, who then was attempting to legislate liberty and security by passage of the Civil Rights Act, said: "The outrages committed upon loyal men there are under the forms of law". (Monroe v. Pape, supra, 365 U. S. 167 at 176). It is submitted that no public official shall be heard to say he is immune from suit as a tort feasor when he has committed an act which he had no lawful authority to do and of the extraordinary wrongful character shown in the amended complaint at bar. (Cf. Land v. Dollar, 330 U. S. 731, at 738).

The case of Peckham v. Scanlon, 241 F. 2d 761, cited by the County Counsel in his brief at page 13 is not in point here because in that case the defendant court reporter had merely failed to deliver a reporter's transcript after request had been made. In the case at bar, among other things, the defendant court reporter conspired to and did fraudulently prepare and have filed in court a fraudulent

reporter's transcript for purpose of fraudulently depriving appellant of his lawful liberty.

THE POSITION OF APPELLEES THAT THIS COURT CAN TAKE NOTICE OF MATTERS NOT OF RECORD.

The County Counsel at page 5 of his brief says:

> "The District Court was entitled to look to the records and files of the Los Angeles Municipal Court in considering the appellees motion to dismiss."

However, the mentioned 'records and files' were not before the District Court and that Court did not look to any such records or files and did not consider any such in deciding upon its orders. The only thing that the District Court looked at was, as Judge Westover stated:

> "THE COURT: Well, Mr. Agnew, I have gone over the complaint, the pleadings. I am going to dismiss the complaint....."

(Rep. Tr. 14, lines 17-19).

Counsel then continues in his brief at page 2 and invites this Court to "take judicial notice of the records and files of the Los Angeles Municipal Court action No. 760466 entitled People of the State of California v. R. W. Agnew. Said records are currently before the United States Supreme Court..."

counsel should have known, that such mentioned records and files are not now and have not been before the United States Supreme Court. Second, it is not made clear how this Court may take judicial notice of records and files of another court and between different parties especially when such records and files are not before this Court (except such as is shown by the Amended Complaint).

C O N C L U S I O N

It clearly appearing that appellant was refused his day in court and redress against appellees for the shocking wrongs they committed against appellant- acts which shock the conscience of mankind- and it appearing that the complaints of appellant are ones which the lower court should hear and decide on the merits after a full trial, and that justice and right command that course; it is respectfully submitted that the orders of the lower court, being in error, should be reversed.

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No. 18541

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. W. AGNEW, Plaintiff and Appellant, vs. RICHARD W. MOODY, MACK E. RHODES, CHARLES B. RUSSELL, ELBERT E. STANFORD, B. C. ESTES, WILLIAM H. PARKER, RICHARD LASKIN, ROGER ARNEBERGH, PHILIP GREY, EDWARD L. DAVENPORT, ROBERT L. BURNS, WILLIAM B. BURGE, WILLIAM DORAN, NORMAN TULIN, HOWARD H. SCHMIDT, CHARLES HURD, CLARA CLAPP, G. VELLA CONSTRUCTION COMPANY, a corporation, DOMINIC GIANGREGORIO CONCRETE CONSTRUCTION COMPANY, a corporation, Defendants and Appellees.	No. 18541

APPELLANT'S PETITION FOR REHEARING

R. W. AGNEW, Pro Se.
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1330 West 51 Street
Los Angeles 37, Calif.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. W. AGNEW, Plaintiff and Appellant, vs. RICHARD W. MOODY, MACK E. RHODES, CHARLES B. RUSSELL, ELBERT E. STANFORD, B. C. ESTES, WILLIAM H. PARKER, RICHARD LASKIN, ROGER ARNEBERGH, PHILIP GREY, EDWARD L. DAVENPORT, ROBERT L. BURNS, WILLIAM B. BURGE, WILLIAM DORAN, NORMAN TULIN, HOWARD H. SCHMIDT, CHARLES HURD, CLARA CLAPP, G. VELLA CONSTRUCTION COMPANY, a corporation, DOMINIC GIANGREGORIO CONCRETE CONSTRUCTION COMPANY, a corporation.	No. 18541

APPELLANT'S PETITION FOR REHEARING

To the Judges of the above entitled Court:

Comes now the above named appellant in this cause and respectfully prays the Court to grant a rehearing herein and prays that such rehearing be before the Court sitting en banc.

1. The Court has held that all defendants, except the police officers, had "immunity" from suit.. As to such holding it is cle the Court has greviously erred in deciding as to the two corporate defendants G. Vella Construction Company and Dominic Giangregorio Concrete Construction Company, they have immunity from suit. They cannot possibly have such immunity.

2. The Court has held that, with the exception of the police officers, the defendants are immune from suit <u>for conduct in the performance of their official duties</u>; this Court then deciding,

justice, to conspire with each other privately and in secret to subject appellant to a fraudulent state trial, to procure appellant to be convicted for pretended crime although having personal knowledge appellant had committed no crime, and to knowingly cause to be entered in the state trial perjured testimony to obtain appellant's conviction although having knowledge such testimony was false and that appellant was wholly and completely innocent of the putative charges, and in the trial to knowingly suppress relevant evidence of appellant's innocence.

3. The Court has held, in effect, that an officer may conspire to utilize and cause to be entered perjured testimony with the knowledge it is false testimony and subject a citizen to be placed on trial although knowing he is innocent of crime or wrong; this Court holding, in effect, that to engage in a criminal and corrupt conspiracy is not outside of the judicial function. The case of Harmon v. Superior Court, ___F.2d ___, is no authority whatever as in that case the complaint failed to plead any act that was legally wrongful on the part of the defendants.

4. As concerning defendant Schmidt this Court said, in effect, that the affidavit of bias and prejudice didn't state facts- only conclusions of law; the affidavit however did state sufficient facts and which facts absolutely prohibited Schmidt from presiding after it was filed. Read it again. Only a crook and base person would be willing to preside after being charged with the facts in the affidavit. This Court, however, then

then says: "...even assuming that appellant's statement of bias and prejudice was legally sufficient..." The Court then goes on to say that maybe Schmidt erred and thus should have judicial immunity. But he had no jurisdiction as a judge after the filing of the affidavit; he was but a naked trespasser and couldn't commit judicial error cause he could not act as a bona-fide judge. To square off the reasoning no effort is made by the Court to truthfully position the matter under the state law of Section 170(5) Code Civil Procedure which clearly uses prohibitory language that after the affidavit is filed "no justice or judge shall sit or act as such in any action or proceeding", and until and unless he makes answer and a ruling is made thereon by another judge. Schmidt made no answer to the affidavit and thus lost any jurisdiction he may have had- even to make an error. He was completely divested of any jurisdiction whatsoever, general and special. An act committed without jurisdiction cannot possibly be said to have been committed in the exercise of jurisdiction. Nor can one have immunity for privately and secretly meeting with others and cooking up criminal practices to be committed against a citizen. The case of Bradley v. Fisher, 80 U. S. 335, cited by the Court, does not hold what the Court attempts to say it holds. See Monroe v. Pape, 365 U. S. 167.

5. The Court has failed to decide the question raised as to whether the clerk, bailiff and reporter have immunity from suit, the Court saying "we do not reach the question". It is appellant's right that the question be decided. The Court then

these persons in the critical events ... was too remote and inconsequential..." Too remote and inconsequential that the court reporter prepared a fraudulent and false reporter's transcript of portions of the trial in order to deprive this appellant of a state appeal on the merits and a federal appeal on the merits, and to do in appellant and subvert justice. So these things are "too remote and inconsequential". I say shame on the Judges of this Court for their false and prejudiced utterance, and their deceitful and corrupt attempt to "slant" the record in this case. The charge is here distinctly made that the Judges have corruptly decided this appeal and therefore it is necessary that the Court en banc decide the matter.

6. The Court says it is satisfied that appellant's case does not fall within the rule of "wrongful acts of an extraordinary character". Appellant is justified in believing that the Judges have read the record herein and from the amended complaint is clearly shown wrongful, corrupt and criminal conduct on the part of defendants- conduct that shocks the conscience of mankind- to pervert justice and obstruct the due and orderly administration of the law and to take the liberty of appellant without due process and by perjured testimony, to subject him to fraudulent state trial and knowing he was innocent of crime or wrong, and to deny him a state and federal appeal by preparing a false and fraudulent reporter's transcript. But, the Court says it is satisfied such conduct is not of an extraordinary character. Nothing could be worse than to poison the fountain of

shocks the conscience of all decent people. For such deliberate deceit and falsely stating the record herein appellant further moves for rehearing on the ground the appeal herein was decided by deliberate fraud on the part of the three Judges. The Court was careful not to set out exactly what the complaint charges. In the premises it is required that the Court en banc decide the appeal. And it is prayed that the Court certify to the United States Supreme Court the question as to whether the wrongful acts charged in the amended complaint are of the character as constituting extraordinary wrongful ones actionable under the Civil Rights Act.

7. The Court has held the amended complaint was not "a short and plain statement of a claim" and that it was proper to dismiss it for refusal to replead and leave out almost all of the proper party defendants including the two corporate defendants. As to this the Court has greviously erred, for a claim cannot be plain if it is too short and not containing the necessary matter required for pleading under the Civil Rights Act and in the case at bar setting forth the great many wrongs of defendants. The Court ignores the requirements in pleading specified in Rule 9(b) F.R.C.P., and apparently has ignored the cases of United States v. Crown Zellerbach Corp., 141 F. Supp. 118, at 131, and Conley v. Gibson, 355 U. S. 41. The remarks of former Justice Sherman Minton, quoted in 'Briefing and Arguing Federal Appeals (Wiener 1961)" are of interest:

"In the Courts of the United States with

out of court because of poor pleading. If the jurisdictional facts are there, the Court will consider your case."

Respectfully,

R. W. AGNEW
Appellant, Pro Se.
1330 West 51 Street
Los Angeles 37, California.

I certify that this petition for rehearing is presented in good faith, that it is not interposed for delay, and that in my judgment it is well founded.

Dated: Los Angeles, California, April 27, 1964.

R. W. AGNEW

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. W. AGNEW, Plaintiff and Appellant, vs. RICHARD W. MOODY, MACK E. RHODES, CHARLES B. RUSSELL, ELBERT E. STANFORD, B. C. ESTES, WILLIAM H. PARKER, RICHARD LASKIN, ROGER ARNEBERGH, PHILIP GREY, EDWARD L. DAVENPORT, ROBERT L. BURNS, WILLIAM B. BURGE, WILLIAM DORAN, NORMAN TULIN, HOWARD H. SCHMIDT, CHARLES HURD, CLARA CLAPP, G. VELLA CONSTRUCTION COMPANY, a corporation, DOMINIC GIANGREGORIO CONCRETE CONSTRUCTION COMPANY, a corporation, Defendants and Appellees.	No. 18541 APPELLANT'S OPENING BRIEF

APPELLANT'S OPENING BRIEF

Appellant:
R. W. AGNEW
1330 West 51 Street
Los Angeles 37, Calif.
Appellant, Pro Se

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IN THE UNITED STATES COURT OF APPEALS

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STATEMENT OF PLEADINGS AND FACTS

DISCLOSING JURISDICTION

This is an appeal (Tr. 122) from Order (Tr. 117) of the United States District Court, Southern District of California, Central Division, Honorable Harry C. Westover, Judge, dismissing plaintiff's Amended Complaint (Tr. 2), and from Order of said court dismissing Action (Tr. 120).

One of these Orders (Tr. 117) being entered November 5, 1962, by which the lower court granted motions of certain of appellees (Tr. 60, 68, 80) to dismiss the Amended Complaint, plaintiff having opposed the motions (Tr. 88, and see Rep. Tr.), the court, however, ordering the Amended Complaint

dismissed with prejudice as to all defendants except defendants Moody and Rhodes and as to them granting plaintiff leave to file a further amended complaint within 20 days (Tr. 117); this Order being at the time not a final adjudication for immediate appealable purposes as this Court has previously decided on December 3, 1962, in No. M-1579 of this Court. The other Order of the lower court (Tr. 120) being entered February 12, 1963, by which the court dismissed the action, the plaintiff not having filed any further amended complaint as to defendants Moody and Rhodes, and the court not having allowed any further amended complaint as to the other defendants.

The original complaint was filed in the lower court within one year after the commission of the wrongful acts by defendants, the amended complaint having been filed before appearance in court of any of the defendants and which amended complaint contained three causes of action under the respective provisions of Sections 1983, 1985 and 1986 of Title 42 U.S.C., the Civil Rights Act.

Jurisdiction of the action by the District Court is founded upon the existence of Federal issues in that the action arises under the Fourteenth Amendment to the Constitution of the United States and under Title 28 U.S.C. Section 1343 and Title 28 U.S.C. Section 1331(a), and under Title 42 U.S.C. Sections 1983, 1985, 1986, in that by the wrongs committed plaintiff was wrongfully deprived of his liberty, assaulted, wrongful search, was subjected to a

fraudulent state trial, subjected to deprivation of his right to due process of law, the equal protection of law, due course of justice, and other rights, privileges and immunities secured to plaintiff by the United States Constitution and Federal laws, the defendants having acted under color of state law, and further pursuant to a conspiracy to impede the due course of justice with intent to deny equal protection of the laws to the plaintiff, and for failure and refusal of certain defendants who having the ability to prevent certain of the wrongs conspired to be committed and they having knowledge thereof refused to prevent or aid in preventing the commission of the wrongs.

Title 28 USC Section 1343, reads:

" The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any

fraudulent state trial, subjected to deprivation of his right to due process of law, the equal protection of law, due course of justice, and other rights, privileges and immunities secured to plaintiff by the United States Constitution and Federal laws, the defendants having acted under color of state law, and further pursuant to a conspiracy to impede the due course of justice with intent to deny equal protection of the laws to the plaintiff, and for failure and refusal of certain defendants who having the ability to prevent certain of the wrongs conspired to be committed and they having knowledge thereof refused to prevent or aid in preventing the commission of the wrongs.

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(3) To redress the deprivation, under color of any

State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. "

Title 28 USC Section 1331(a), reads:

" (a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. "

Title 42 USC Section 1983, reads:

" Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, to any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. "

Title 42 USC Section 1985, reads in pertinent part, as follows:

" (2) ...or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) ...in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against one or more of the conspirators. "

Title 42 USC Section 1986, in pertinent part, reads:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action ..... But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads:

" All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

equal protection of the laws. "

This Honorable Court has jurisdiction, in the opinion of appellant, of this appeal by virtue of the provisions of Title 28 USC Sections 1291 and 1294(1).

Title 28 USC Section 1291, reads, in pertinent part:

" The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. ..... "

Title 28 USC Section 1294(1), reads in pertinent part:

" Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; ..... "

STATEMENT OF THE CASE AND THE QUESTIONS INVOLVED

A. The Questions involved:

The question involved is whether the District Court erred in (1) dismissing the Amended Complaint with prejudice as to all defendants other than Moody and Rhodes; (2) in dismissing the Amended Complaint without prejudice as to Moody and Rhodes; and (3) in dismissing the action as to all defendants. Inherent in these primary questions are

further secondary questions, to wit:

(4). Has not the Civil Rights Act providing that "Every person who" engages in the forbidden conduct is liable, abrogated common law judicial immunity of a judge from suit, and especially so for the shocking and corrupt acts shown in the Amended Complaint, and when considering the concluding paragraph of Tenney v. Brandhove, 341 U.S. 367, at page 378, reading:

> "We have only considered the scope of the privilege (of legislative immunity from slander suit) as applied to the facts of the present case. As Mr. Justice Miller said in the Kilbourn case (103 U.S. 168): 'It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible.' "

(5) Does a judge of a State court have judicial immunity from suit where he has "Conspired" with others to deny to plaintiff the due course of justice, due process of law and the equal protection of the law, to subject plaintiff to fraudulent state trial, to deprive plaintiff of his rights, privileges and immunities secured to plaintiff under the federal laws and Constitution, and knowlingly neglected and failed to prevent

the wrongs conspired to be done to plaintiff although having the power to prevent or aid in preventing the commission of the wrongs.

(6) Did the wrongful acts of defendant Schmidt, or the affidavit of bias and prejudice filed and served on defendant Schmidt on July 24, 1961 (Tr. 2) under the provisions of Section 170(5) of the Code of Civil Procedure of the State of California, divest defendant Schmidt of any judicial power to further preside as judge in the criminal trial, the defendant Schmidt having failed for over five days to make sworn answer to such affidavit. And, if so, is not then any claim of judicial immunity improper for wrongful acts committed against plaintiff after such divestation of judicial authority.

(7) Is a person liable for <u>extraordinary</u> wrongful conduct where that person acting under color of judge in a State court criminal trial intentionally denies to the accused a trial in due process of law and by corrupt means and manner procures conviction of the accused- the intentional refusal to accord the accused due process of law having divested such person acting as judge from all authority as a bona fide judge.

(8) Does a State court court reporter or a State prosecuting officer have immunity from suit where he has joined in a conspiracy to deny plaintiff in a State court trial the due course of justice, due process of law, and of equal protection of law, and to deprive plaintiff of

his rights, privileges and immunities secured to plaintiff by the terms of Federal law and Constitution.

(9) Is the amended complaint such a pleading in the premises as warrants a conclusion by the District Court that it is not a "short and plain statement of a claim" when considering there are nineteen named defendants and considering the allegations required for each of those nineteen defendants, and considering the great number of wrongs which must be set forth factually in order to factually state a claim.

(10) Is the amended complaint a pleading sufficient to entitle plaintiff to some relief prayed.

(11) Would not it be a denial of right under Federal procedure for a District Court to compel a plaintiff to forego just complaint against some named defendants- to compel framing of a further amended complaint- and leave out of it all defendants except Moody and Rhodes.

B. Statement of the case:

The Action was dismissed by the District Court and without any appearance whatsoever by twelve of the named defendants, and as to them, being dismissed on the ground the amended complaint did not constitute a short and plain statement of a claim and that these defendants had official immunity from suit; that as to defendant Schmidt that he had judicial immunity from suit and also that the amended complaint was not a short and plain statement of a claim, and as to defendants Laskin, Doran, Burge and Tulin, that

the amended complaint was not a short and plain statement of a claim and that they each had official immunity from suit; and as to defendants Moody and Rhodes that the amended complaint was not a short and plain statement of a claim.

The amended complaint in its three counts pleaded that named defendants had intentionally committed and conspired to commit wrongful acts against plaintiff and having knowledge the wrongful acts were about to be committed neglected and failed to prevent or aid in preventing the commission of the wrongful acts although having power to do so, the wrongful acts having been intentionally committed and conspired to be committed while defendants were acting under color of state law; these wrongful acts being pleaded in the amended complaint and showing that named defendants had arrested and restrained plaintiff of his personal liberty without reasonable or probable cause and without warrant or right in law, had assaulted plaintiff without justification in law, had searched the automobile whereat plaintiff was seated and without warrant in law and without any reasonable or probable cause, and had subjected plaintiff to a fraudulent state trial and deprived plaintiff to the due course of justice, of equal protection of the law and of due process of law. The plaintiff pleaded the wrongful acts and pleaded his injuries and damages in certain sum, and praying for stated relief.

SPECIFICATION OF ERRORS

(1) The court erred in dismissing the Amended Complaint with prejudice as to all defendants except defendants Moody and Rhodes (Tr. 117);

(2) The court erred in dismissing the Amended Complaint as to defendants Moody and Rhodes (Tr. 117);

(3) The court erred in dismissing the Action (Tr. 120).

ARGUMENT

I. The Amended Complaint, in the premises, constitutes a short and plain statement of a claim.

The Judge of the lower District Court thought that a complaint consisting of 57 pages did not constitute a short and plain statement of a claim (Rep. Tr. 3, 4, 14, 15).

> "The minimum under Rule 8(a2) providing that complaint shall contain a short and plain statement of claim showing that pleader is entitled to relief, is that adversary party must be sufficiently advised to prepare his defense, and a claim cannot be stated in form of a legal conclusion without more."

Sheridan-Wyoming Coal Co. v. Krug (App. D.C. 1948) 168 Fed. 2d 557.

In speaking of a "short and plain statement" of a

claim the Court in Cababrese v. Chiumento, 3 F. R. D. 435, stated that statement in complaint may not be fully clear or artistically drawn does not constitute a ground for dismissal of the complaint under Federal Rules of Civil Procedure, Rules 8(a)(2), 12(b)(6), 28 USC, following section 723c.

> "...Rule 8(e), 28 USCA following section 723c, is intended to simplify pleadings and calls for "a short and plain statement" of the grounds, claim and demand for relief. However, it is always the duty of the pleader to sufficiently inform the adverse party of the charge against him in such a manner as to enable him to prepare a responsive pleading. ..."

Makan Amusement Corp. v. Trenton-New Brunswick Theatres Co., 3 F. R. D. 429, at page 431.

> "Generally, a "cause of action" does not consist of facts, but an unlawful violation of a right which facts show."

American Fire & Cas. Co. v. Finn, 341 U. S. 6.

Cf Sidebotham v. Robinson (9th Cir.) 216 Fed. 2d 816.

The pitfalls in pleading a claim under the Civil Rights Act is far rougher than is the usual claim for pleading; the facts must be stated; to state the facts requires sometimes more than a "short" statement. And it is required that the acts termed wrongful were committed "under color of" state or local law; and the requirement

to plead the capacity of the person committing the acts as that he was acting "under color of" his official position. These matters require space, as well does allegations involving nineteen defendants in the Amended Complaint, and as well does the great number of wrongs done to plaintiff.

In Bader v. Zurich Gen. Acc. & Liability Ins. Co., (D.C. N.Y. 1952) 12 F. R. D. 437, the Court had dismissed the complaint saying it was insufficient to assert a claim under the anti-trust laws, and that for a failure to state the pertinent facts, the plaintiff having sought to charge defendant insurance company with being member of conspiracy with other insurance carriers to refuse insurance to plaintiff in violation of anti-trust laws, the court noting that the complaint did not state facts on which charge was based or terms of the conspiracy, members thereof, if known, methods adopted to effectuate ends of conspiracy, and was such a complaint wholly insufficient for statement of a claim.

In United States v. Schefrin (D.C. N.J. 1953) 14 F. R. D. 462, the court pointed out that under Rule 8(a) F. R. C. P., the essence of a complaint is not the statement of a technical cause of action, but a statement of the conduct, transaction, or occurence, out of which plaintiff's rights, and defendant's wrong, arose.

In Arthur A. Aranson, Inc. v. Ing-Rich Metal Products Co., (D.C. Pa. 1952) 12 F. R. D. 528, the court

stated that a complaint which meets requirements of Rule 8(a)(e) F. R. C. P., providing that pleading which sets forth a claim for relief shall contain short and plain statement of claim showing that pleader is entitled to relief, and that no technical forms of pleading or motions are required, is sufficient except where, as provided by Rule 12(e) F. R. C. P., the pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.

In Robinson v. Lull (D.C. Ill. 1956) 145 Fed. Supp. 134, the court stated: "While the complaint was not simple, concise, and direct as required by Rule 8(e) F. R. C. P., where the allegations read as a whole were sufficient, the plaintiff was entitled to have his day in court."

In Carrier Corp. v. Sims Motor Transport Lines, Inc., (D.C. Ill. 1953) 15 F. R. D. 142, the court held that a pleading was not too verbose, which alleged claim for malicious prosecution and malicious abuse of process and which charged adverse party with having instigated federal grand jury investigation which resulted in indictment, that the adverse party falsely caused warrant of arrest of claimant, that claimant was taken into custody, gave bond, was arraigned and pleaded not guilty, that indictment was dismissed on motion of district attorney, that the adverse party demanded of claimant $91,080, knowing claimant was not indebted to adverse party, and that adverse party caused claimants arrest in order to extort payment of such

sum.

In Kamen Soap Products Co. v. Struthers Wells Corp., (D.C. N.Y. 1958) 159 Fed. Supp. 706, the court stated that a complaint, although prolix and containing unnecessary detail and evidentiary matter, was not subject to dismissal on ground that it did not contain a short and plain statement of claim and that averments were not simple, concise and direct, where it clearly apprised defendants of claims they were called upon to meet.

> "The question of whether any pleading violates Rule 8(a)(e) F.R. C. P., as to what is a short and plain statement of claim and as to what constitutes redendant, immaterial, or impertinent matters depends upon the particular case involved."

Gomillion v. Lightfoot (D.C. Ala. 1958) 167 Fed. Supp. 405.

> "It is not a sine qua non to the sufficiency of a pleading that it be artistically drawn."

Selby Mfg. Co. v. Grandahl, 200 Fed. 2d 932.

In Atwood v. Humble Oil & Refining Co., 243 Fed. 2d 885, cert. den. 355 U. S. 829, the court stated that what is a short and plain statement of a claim under Rule 8(a)(e) F. R. C. P., depends upon the circumstances of the case; that in an action against an oil company seeking enforcement of certain oil and gas leases or cancellation thereof, recovery of approximately 1-1/2 million dollars accrued royalties and other related relief involving many and varied issues and long and complicated leases, that the

trial court erred in dismissing the complaint with prejudice for failure to comply with Rule 8(a)(e) requiring a short and plain statement of claim, operated as an adjudication upon the merits.

> "When fraud is alleged, it must be particularized."

Corrigan v. California State Legislature (9th Cir.) 263 Fed. 2d 560, cert. den. 359 U. S. 980.

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Federal Rules of Civil Procedure, Rule 9(b).

See In re Burton Coal Co. (D.C. Ill. 1944) 57 Fed. Supp. 361.

Independence Lead Mines Co. v. Kingsbury, 175 Fed. 2d 983, cert. den. 70 S. Ct. 249.

Hoover v. Lacey (D.C. C. C. 1943) 80 Fed. Supp. 691.

Martin v. Clayton (D.C. N.Y. 1946) 6 F. R. D. 214.

United States ex rel. Coates v. St. Louis Clay Products Co., (D.C. Mo. 1943) 3 F. R. D. 289.

In Connor v. Real Title Corp., 165 Fed. 2d 291, the court held that allegation of "vicious conspiracy and collaboration" between defendants to prevent plaintiff's collection of rentals from realty which plaintiff contracted to purchase was too vague and must fall where

allegation was unsubstantiated by any facts disclosed in the pleadings.

In the case at bar the allegations for claim is set out and is also the facts to substantiate the allegations made. The Judge of the lower District Court objected, it would seem, to plaintiff pleading the facts- branding such, because being so many pleaded, as not in conformity with a short plain statement of a claim.

> "...each case must necessarily stand upon its own bottom, and the court should require pleadings that will "secure the just, speedy and inexpensive determination of every action". Rule 1. "All pleadings shall be construed as to do substantial justice." Rule 8(f). In Hughes Federal Procedure, Vol. 17, Sec. 19621, it is said: "It would seem, therefore, that the court should adopt a liberal viewpoint in determining whether the pleading actually does contain "a short and plain statement of the claim" and should not require that the pleading contain ultimate facts only. This seems to be the trend of the recent decisions." The rule should not be so liberally construed as to destroy definiteness in pleading. A "short and plain statement" must be reasonably definite or it will not be plain. A speedy and just and inexpensive trial cannot be had merely upon the filing of a notice of Claim and then resorting

to the expensive and indefinite procedure of discovery and depositions. ..."

Fleming v. Dierks Lumber & Coal Co., (D.C. W.D. Ark. 1941) 39 Fed. Supp. 237, at page 240.

In Burt v. City of New York (2nd Cir. 1946) 156 Fed. 2d 791, a civil rights Act case, the court noted the plaintiff's pleading was no model, but stated the rule as to sufficiency of a pleading:

"...The amended complaint is hard to understand, but, considering the latitude to be allowed to pleadings under Rule 8(f) Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c (Dioguardi v. Durning, 2 Cir., 139 F. 2d 774), we think the following can be drawn from it. ...."

The factual situation to be disclosed in a claim and to be pleaded by positive supporting circumstances, is shown in Mulloney v. Federal Reserve Bank of Boston (D.C. Mass. 1938) 26 Fed. Supp. 148, where the adverse party had made a motion for further particulars of the complaint. Said the court:

"[1] The plaintiff's declaration is long and prolix, and is replete with vague allegations of misrepresentations, bad faith, libel, slander and coercion, all as parts of a conspiracy to wrong the plaintiff by bringing about the failure of the Federal National Bank of which he was president. It is not possible for any defendant to

meet these allegations without further particulars respecting the identity of the defendant or of his agents and representatives who participated in the alleged wrongful acts, and without a more definite statement of the times and places of the events alleged, which extend over a period of more than eight years."

The court states in Dublin Distributors v. Edward & John Burke, Ltd. (D.C. S.D.N.Y. 1952) 109 Fed. Supp. 125:

"Despite liberality and flexibility of federal rule of civil procedure requiring only a short and plain statement of the claim showing that the pleader is entitled to relief, proper pleading in private anti-trust suit requires statement of facts, upon which cause of action is founded considerably more extensive than that required in a simple negligence or contract action. Fed. Rules Civ. Proc. Rule 8(a), 28 U.S.C.A."

In United States v. Stull (D.C. Conn. 1952) 105 Fed. Supp. 568, at page 570, affr. 200 Fed. 2d 413, the court says:

"In order to comply with Rule 8(a) F. R. C. P., it is necessary only that the complaint shall be sufficient so that the defendant will have fair notice of the claim asserted and so that the court may properly appraise the validity of the claim. 2 Moore's Federal Practise (2d ed.) 1647-

1956."

Cf. McCoy v. Province Journal Co., 190 Fed. 2d 760.

On the hearing of motions to dismiss, the lower court said:

" THE COURT: Well, Mr. Agnew, I have gone over the complaint, the pleadings. I am going to dismiss the complaint in its entirety because you have failed to comply with Rule 8, in failing to file a short and plain statement. Also I am going to dismiss with prejudice as to all defendants other than Moody and Rhodes, who are the police officers who stopped you, and I will dismiss without prejudice as to them. You may be able to state a cause of action against the officers who stopped you, but you certainly cannot state a cause of action against a judge, the United States Attorney, or the court reporter, or the marshal, or anybody else. The action will be dismissed, the complaint will be dismissed in its entirety for the failure to comply with Rule 8, Subdivision A. The dismissal will be with prejudice to all defendants except the two police officers, Moody and Rhodes, and that will be without prejudice, so if the plaintiff wants to file a complaint against Moody and Rhodes and comply with the rule, I will be glad to hear it. "

(Rep. Tr. page 14, line 17, over to line 10 on page 15).

It would be appropriate to point out, also that the

Reporter's Transcript discloses a bias and prejudice bordering on animosity on the part of Judge Westover towards plaintiff because, apparently, plaintiff had the gall to appear before the Judge in his court in propria persona, and in response to questions of the judge to make answer as to opinion of the law as a layman.
(Rep. Tr. page 12, lines 7-10).

It thus appears that the Amended Complaint was dismissed as to all defendants except Moody and Rhodes because of "want of jurisdiction" (on basis of immunity from suit) and with prejudice- clearly an untenable ground.

II. The Amended Complaint states a Claim sufficient to entitle plaintiff to some relief prayed, and the District Court therefore erred in dismissing the Amended Complaint.

"...jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be

granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. ..."

Bell v. Hood, 327 U. S. 678. (civil rights Act case).

See also Westminister School District of Orange County v. Mendez (9th. Cir.) 161 Fed. 2d 774, 778-779.

"...a complaint shall not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (citing cases). . . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. (citing case). ..."

Conley v. Gibson, 355 U. S. 41.

"There is no justification for dismissing a complaint unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could

be proved in support of the claim stated."

Young v. Hicks, 250 Fed. 2d 80.

"That statement in the complaint may not be fully clear or artistically drawn does not constitute a ground for dismissal of complaint."

Calabrese v. Chiumento (D.C. N.J. 1944) 3 F. R. D. 435.

"A complaint is sufficient under the rules of pleading, if it shows a right of recovery, and complaint may not be dismissed because of mere defects in averments."

Cargill Inc. v. Kelley (D.C. Mo. 1949) 9 F. R. D. 436.

"A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which chould be proven to support claim."

Fair v. United States, 234 Fed. 2d 288.

Christensen v. Great Lakes Towing Co., 206 Fed. Supp. 907.

"A complaint must be held sufficient if, on any view of allegations, plaintiff states facts sufficient to entitle him to relief."

City of Daytona Beach v. Gannett Fleming Corddry & Carpenter, Inc., 253 Fed. 2d 771.

"Complaints in the federal courts will not be dismissed if there is any theory on which they can be sustained."

American Airlines, Inc. v. Air Line Pilots Ass'n, Interm., (D.C. N. Y. 1958) 169 Fed. Supp. 777.

State of California v. United States (D.C. Cal. 1957) 151 Fed. Supp. 570.

> "Outright dismissal of a pleading or a portion of a pleading for reasons not going to merits is viewed with disfavor in the federal courts."

McCormick v. Wood (D.C. N.Y. 1957) 156 Fed. Supp. 483.

> "Motion to dismiss complaint for failure to state claim should not be granted unless averments in complaint disclose with certainty that plaintiff would not be entitled to relief under any state of facts which could be proved in support of claim."

King Edward Emp. Federal Credit Union v. Travelers Indem. Co., 206 Fed. 2d 726.

> "A pleading should not be dismissed unless it appears to a certainty that the pleader is entitled to no relief under any state of facts which could be proved in support of the claim."

Forstmann Wollen Co. v. Murray Sices Corp. (D.C. N.Y. 1950) 10 F. R. D. 367.

> "If it can reasonably be conceived that the plaintiff can make a case upon trial which would entitle him to some relief the complaint should not be dismissed."

Jung v. K. & D. Min. Co., 260 Fed. 2d 607.

"On motion to dismiss, every material fact well pleaded in complaint, construed in light most favorable to plaintiff, is admitted, and any ambiguities must be resolved in favor of claim attempted to be stated."

Parkinson v. California Co., 233 Fed. 2d 432.

Accord: United States v. Russell, 241 Fed. 2d 879.

Lehrer v. McCloskey Homes, Inc., 245 Fed. 2d 11.

Creswell-Keith, Inc. v. Willingham, 264 Fed. 2d 76.

Hoffman v. Halden (9th Cir.) 268 Fed. 2d 280.

"[1, 2] A motion to dismiss a complaint for failure to state a claim on which relief can be granted admits the facts alleged in the complaint, but challenges the plaintiff's right to relief. The complaint should not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim. (citing cases)."

United States Fidelity & Guaranty Co. v. Ditoro, 206 Fed. Supp. 528.

"On motion to dismiss complaint, truth of all facts well pleaded is admitted, including facts alleged on information and belief."

Frederick Hart & Co. v. Recordgraph Corp., 169 Fed. 2d 580.

"On motion to dismiss a complaint under Rule 6(b) F. R. C. P., for alleged failure to state a claim, the complaint is to be liberally construed, and mere vagueness or lack of detail is not a ground for motion to dismiss."

Mueller v. Rayon Consultants, Inc. (D.C. N.Y. 1959) 170 Fed. Supp. 555.

"On motion to dismiss amended complaint the allegations thereof must be liberally interpreted, and a plaintiff is entitled to most favorable inferences therefrom, even if contrary inferences are also possible."

Sidebotham v. Robinson (9th Cir.) 216 Fed. 2d 816

"On ruling on a motion to dismiss a complaint on the ground of lack of jurisdiction and failure to state a claim upon which relief can be granted, the complaint must be given the benefit of every possible implication."

Anderson v. Pennsylvania R.R. Co. (D.C. N.Y. 1956) 143 Fed. Supp. 411.

"On motion to dismiss complaint, on ground that it fails to state a claim on which relief can be granted, court must assume truth of allegations of complaint, and if, under any view of it, court can grant any relief whatsoever, complaint in itself is sufficient."

Sherwin v. Oil City Nat. Bank (D.C. Pa. 1955) 18 F. R. D. 188, affr. 229 Fed. 2d 835.

Cf. Lewis v. Brautigan, 227 Fed. 2d 124, 55 A.L.R. 2d 505.

> "To be good against a motion to dismiss, the complaint must allege a claim, meaning a legal right, the infringement of which by defendant has caused damage to plaintiff."

Matusiak v. Pennsylvania R.R. Co. (D.C. N.J. 1955) 134 Fed. Supp. 681.

> "A complaint may not be dismissed on motion, if it states some sort of claim, baseless though it may eventually prove to be, and inartistically as the complaint may be drawn."

Crockard v. Publishers, Saturday Evening Post Magazine of Philadelphia, Pa. (D.C. Pa. 1956) 19 F. R. D. 511.

> "On motion to dismiss action for failure of complaint to state a claim upon which relief can be granted, pleader is entitled to an opportunity to try to prove claim, no matter how likely it may seem that he will be unable to do so."

Myers v. United States (D.C. N.Y. 1958) 162 Fed. Supp. 913.

> "No matter how unlikely it may seem that pleader will be able to prove his case, he is entitled on averring a claim, to an opportunity to try to prove it."

Shapiro v. Royal Indem. Co. (D.C. Pa. 1951) 100 Fed.Supp.801.

"In passing upon motion to dismiss, court must accept as true the particular allegations of fact made by plaintiffs in their complaint and in supporting documents."

Canuel v. Oskoian (D.C. R. I. 1959) 23 F. R. D. 307, affr. 269 Fed. 2d 311.

"On motion to dismiss for failure to state claim upon which relief can be granted, every intendment favorable to plaintiff must be indulged."

Deleware Floor Products v. Franklin Distributors (D.C. Pa. 1951) 12 F. R. D. 114.

Robinson v. Fanelli (D.C. N.Y. 1950) 94 Fed. Supp. 62.

The wrongful conduct pleaded in the Amended Complaint being known to the named defendants, the rule for requiring more particulars of those wrongs is not favored. As was said in Fleming v. Dierks Lumber & Coal Co., 39 Fed. Supp. 237, that ordinarily, a bill of particulars will not be ordered as to matters that are peculiarly within knowledge of moving party.

The statutory prerequisites to liability under Title 42 USC Section 1983, are:

(1) That the defendant act "under color of" State or local law, and,

(2) That the plaintiff be subjected to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Section 1983 encompasses two types of deprivations:

(1) Those where the defendant directly subjects a citizen to the same, and,

(2) Those where he causes a citizen to be subjected.

Stringer v. Dilger, 313 Fed. 2d 536.

> "The only elements which need be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges or immunities secured by the Constitution of the United States."

Marshal v. Sawyer (9th Cir.) 301 Fed. 2d 639.

Cohen v. Norris, (9th Cir.) 300 Fed. 2d 24.

Monroe v. Pape, 365 U. S. 167.

> "...We are of the opinion that permitting an act, where one has knowlege that it is impending and has the power and duty to prevent it, is the equivalent of directing it, so far as legal responsibility therefor is concerned. ..."

Fernelius v. Pierce, 22 Cal. 2d 226, at page 239, 138 Pac. 2d 12.

If "official immunity" should be allowed to a state officer for his corrupt act against a citizen such result would run counter to the purposes of the Civil Rights Act

and would in fact destroy the force of the Act and invalidate the intent of Congress in the enactment of the Civil Rights Act. The purpose of the Civil Rights Act is rendered plain from the comments of the Supreme Court in Monroe v. Pape, 365 U. S. 167.

> (p. 171) Its purpose is plain from the title of the legislation, "An act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 12. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R. S. Sec. 1979. See Douglas v. Jeanette, 319 U. S. 157, 161-162. So far petitioners are on solid ground. . . .
>
> (p. 172) The Ku Klux Act grew out of a message sent to congress by President Grant on March 23, 1871, reading:
>
> "A condition of affairs now exists in some States of the Union rendering life and property insecure . . . . Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. . . .

The legislation--in particular the section with which we are now concerned--had several purposes. There are threads of many thoughts running through the debates. One who reads them in their entirety sees that the present section had three main aims.

First, it might, of course, override certain kinds of state laws. . . .

Second, it provided a remedy where state law was inadequate. . . . But the purposes were much broader. The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practise. . . . It was not the unavailability of state remedies but the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum behind this "force bill."

(p. 176) There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. In speaking of conditions in Virginia, Mr. Porter of that State said:

> "The outrages committed upon loyal men there are under the forms of law."

Mr. Burchard of Illinois pointed out that the statues of a State may show no discrimination:

"If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimination, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced

and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. "

The federal guaranty of due process under the 14th Amendment extends to state action through judicial as well as through legislative, executive, or administrative branch of government.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673. reversing 323 Mo. 180, 19 S. W. 2d 746.

Mooney v. Holahan, 294 U. S. 103, reh. den. 294 U.S. 732.

Owens v. Battenfield, 33 Fed. 2d 753, cert. den. 280 U.S. 605.

Kenny v. Fox, 132 Fed. Supp. 305, affr. 232 Fed. 2d 288.

III. The assertion of defendant Howard H. Schmidt that he has judicial immunity, under the common law, from suit.

First, it must be remembered that defendant Schmidt by his motion to dismiss admitted the well-pleaded allegation of the amended complaint that he had been divested of jurisdiction as judge in the state criminal trial.

Second, it would appear that the Civil Rights Act has abrogated any common law judicial immunity.

Third, even if the Civil Rights Act has not abrogated common law judicial immunity, a person is nevertheless liable for an "extraordinary" wrongful act

under the Civil Rights Act where defense is based on official immunity.

Fourth, the cases agree there can be no immunity from suit for wrongful acts pursuant to a formed conspiracy.

There is no judicial immunity from suit for wrongful act by a state judge pursuant to formed Conspiracy against the claimant.

McShane v. Moldovan, 172 Fed. 2d 1016.

Kenney v. Fox, 232 Fed. 2d 288.

In McShane v. Moldovan, 172 Fed. 2d 1016, the court held a State judge and State officers liable to suit under the Civil Rights Act for false imprisonment, for subjecting the claimant to a fraudulent state trial, and for wrongful conviction by reason of wilful and malicious conspiracy designed to that end, the Court saying at page 1019:

> "[4] If the allegations of the complaint are true, appellant was falsely imprisoned and subjected to fraudulent trial in a criminal case and a wrongful conviction by reason of a wilful and malicious conspiracy designed to that end and carried out by officials of the State of Michigan and others, acting under the guise of Michigan law. Such conduct would amount to a deprivation of plaintiff's liberty without due process of law."

It is not doubted, in any case, that if a judge acts or proceeds in the clear absence of any color of jurisdiction or proceeds officially in respect to a cause or matter over which the court is clearly without any color of jurisdiction, he may be subjected to personal liability as a trespasser for damages arising out of his unauthorized act.

Bradley v. Fisher, 80 U.S. 335, 351-352.

Bottone v. Lindsley, 170 Fed. 2d 705, cert. den. 336 U.S. 944.

Manning v. Ketchum, 58 Fed. 2d 948.

McShane v. Moldovan, supra, 172 Fed. 2d 1016.

Picking v. Pennsylvania R.R. Co., 151 Fed. 2d 240, cert. 332 U.S. 776.

Ryan v. Scoggin, 245 Fed. 2d 54, at page 58.

Burt v. City of New York (2nd Cir 1946) 156 Fed. 2d 791.

Morgan v. Null (D.C. N.Y. 1953) 117 Fed. Supp. 11.

Farish v. Smoot (Fla.) 58 So. 2d 534.

Rummage v. Kendall, 168 Ky. 470, 185 S.W. 2d 954.

Earp v. Stephens, 1 Ala. App. 447, 55 So. 266.

Regarding judicial immunity and its relationship to the amended complaint the first thing to be noted is that a count therein pleads a conspiracy of named defendants, including defendant Schmidt, to commit a wrongful act against plaintiff. The doctrine of judicial immunity is never a valid defense as to a charged conspiracy, since taking part in a conspiracy is outside of the

judicial function. Arguing that judicial immunity is a defense to a conspiracy to inflict a wrong on another is the same as arguing that a judge would be immune to a charge of bribery because he accepted a bribe in connection with his judicial duties.

The common law doctrine of judicial immunity was distinctly stated by the court in Picking v. Pennsylvania R. Co., 151 Fed. 2d 240, cert. den. 332 U. S. 776, to have been abrogated by the Civil Rights Act if suit was founded under those statutes.

Cf Ginsburg v. Stern, 225 Fed. 2d 245 (commenting on Picking).

Burt v. City of New York (2d Cir. 1946) 156 Fed. 2d 791.

Morgan v. Null (D.C. N.Y. 1953) 117 Fed. Supp. 11.

The Civil Rights Act includes all persons who commit the forbidden act and fall within the class liable.

"Every person who, ..." (28 USC Sec. 1983).

"If two or more persons conspire..." (Id, Sec. 1985).

"Every person who, having knowledge..."(Id.Sec. 1986).

It would seem clear that "Every person" means all, means excepting no one, and means anybody that falls within the purview of the Civil Rights Act. But if we shade that meaning as was done in Tenney v. Brandhove, 341 U.S. 367, because the wrongful act was not an extraordinary one, (slander), the shade cannot be darker than that the

person is liable for his wrongful act if the act be an extraordinary wrongful one; this is recognized by the Supreme Court in the Tenney case in the last paragraph. It is thus recognized by the Supreme Court of the United States that for an extraordinary wrongful act an official could be held liable under the Civil Rights Act. In the Tenney case Mr. Justice Douglas stated in referring to legislators, at page 382, "No other public official has complete immunity for his actions. ...I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain."

It is submitted that the wrongful acts practised against the plaintiff at bar, as shown by the Amended Complaint, fall within the area of "extraordinary" wrongful acts.

> "This section must be deemed to include members of state judiciary acting in official capacity. Congress by enacting this section, intended to abrogate absolute privilege conferred by common law upon judicial officers in performance of their duties to extent indicated by this section."

Picking v. Pennsylvania R. Co., 151 Fed. 2d 240, cert. den. 332 U.S. 776.

Morgan v. Null, (D.C. N.Y. 1953) 117 Fed. Supp. 11.

Cf. Ex parte Virginia, 100 U. S. 339.

A state judge having committed a corrupt act in

order to deprive a citizen of his rights, privileges, and immunities protected by federal law and Constitution, and thus by such corrupt act being outside the law, would appear to be an "outlaw" which as a secondary definition Webster's dictionary designates as being "a lawless person". And, it would appear that "a lawless person" is certainly liable for his lawless and corrupt conduct, such liability being expressly authorized by the Civil Rights Act. In the Amended Complaint at bar the wrongful acts shown practised against plaintiff were of such extraordinary wrongful character as to affect the Government itself- as to poison the fountain of justice- the foundation of Government.

In Marshal v. Sawyer (9th Cir. 1962) 301 Fed. 2d 639, the Governor of Nevada, its Gaming Control Board and members, and Gaming Commissioners, were held amendable to the provisions of the Civil Rights Act.

There are cases which deride the Picking case, supra, 151 Fed. 2d 240, and make claim that complete judicial immunity even for extraordinary wrongful acts, is a "necessity" for operation of the courts. This is, of course, especially as to extraordinary wrongful acts, simply not so. It would seem that if a line is to be cut in the Civil Rights Act the line should be anchored on good faith and an act not of the magnitude which shocks the conscience of mankind- to subject a citizen to a fraudulent state trial.

The tyrant's plea, excus'd his

Devilish deeds."

Paradise Lost, Book IV, line 393, John Milton.

In Morgan v. Null (D.C.N.Y. 1953) 117 Fed. Supp. 11, the Court stated that tort liability under the Civil Rights Act could be imposed against agents of the state such as three psychiatrists connected with a city mental hospital, various other state officials, and an assistant district attorney of New York County and the medical examiner for the district attorney, all of whom allegedly had joined in wrongful conduct or conspiring to subject citizen to deprivation of her right to equal protection of the law and her rights, privileges, and immunities secured to her by the Constitution and federal law. Said the Court further at page 16:

> ". . .Immunity of state officials under state law from tort liability arising by reason of performance of official duties does not extend to a claim asserted under the Act [Civil Rights Act]. The statute is aimed at all state officials, be they prosecutors (Ghadiali v. Deleware State Medical Soc., D.C.D. Del., 28 F. Supp. 841); judges (Picking v. Pennsylvania R. Co., 3 Cir., 151 F. 2d 240, 242, rehearing denied, 3 Cir., 152 F. 2d 753; Ex parte Virginia, 100 U. S. 339, 346, 25 L.Ed. 676); governors (Picking v. Pennsylvania R. Co., supra; Miller v. Rivers, D.C.M.D. Ga., 31 F. Supp. 540,

reversed on other grounds, 5 Cir., 112 F. 2d 439); mayors (Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Sellers v. Johnson, 8 Cir., 163 F. 2d 877, certiorari denied, 332 U.S. 851, 68 S.Ct. 356, 92 L.Ed. 421); or other officials (e. g. McShane v. Moldovan, 6 Cir., 156 F. 2d 791, 797). See Gregoire v. Biddle, 2 Cir., 177 F. 2d 579, certiorari denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.ed. 1363. The Civil Rights Statute gives the right of a civil action for deprivation of rights, privileges, and immunities secured by the Constitution or laws of the United States. Cf. Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.ed. 1495. The Federal jurisdiction is expressly conferred by 28 U.S.C. Section 1343. ...."

Under California law if a litigant appearing before a judge serves and files a timely (when bias or prejudice is discovered) and proper affidavit of bias and prejudice against that judge such judge is divested of jurisdiction and may not recover jurisdiction until he makes answer by affidavit within five days and a determination thereof by another judge.

California Code of Civil Procedure, Section 170, Sub-division 5.

Giometti v. Etienne, 219 Cal. 687, page 689, 28 P. 2d 913.

People v. Compton, 123 Cal. 403, page 414, 56 P. 44.

Younger v. Superior Court, 136 Cal. 682, 69 P. 485.

Turkington v. Municipal Court, 85 Cal. App. 2d 631, page 639, 193 P. 2d 795.

Blackman v. MacCoy, 169 Cal. App. 2d 873, 339 P. 2d 169, 338 P. 2d 234.

Abelleira v. District Court of Appeal, 17 Cal. 2d 280, page 290, 109 P. 2d 942.

Even if California had not Section 170 Code of Civil Procedure prescribing procedural manner to divest judge of judicial authority, a judge who having committed the acts shown in the Amended Complaint would forthwith lose jurisdiction by operation of due process of law under the 14th Amendment. It also is in interest of public welfare, safety, and policy under due process that no judge shall sit or act where by his sitting or acting justice is made suspect in the eyes of the public and justice is not then made to appear as such.

State v. Martin, 125 Okl. 24, 256 P. 681, page 684.

State v. Freeman, 102 Okl. 291, 229 P. 296.

Bryce v. Burke, 172 Ala. 219, 55 So. 635.

Commonwealth v. Murphy, 295 Ky. 466, 174 S. W. 2d 681.

Grafton v. Holt, 58 W. Va. 182, 52 S. E. 21.

Because this would be state action violative of the Fourteenth Amendment, of which long ago it was declared:

> "It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States

or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws."

Civil Rights Case, (1883) 109 U.S. 3.

"A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law."

Tumey v. Ohio, 273 U.S. 510.

The "due process of law" which the Fourteenth Amendment exacts from the States is a conception of fundamental justice. It is not satisfied by merely formal procedural correctness.

Herbert v. Louisiana, 272 U.S. 312.

Palko v. Connecticut, 203 U.S. 319.

"...State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands. ...The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. ..."

Shelley v. Kraemer, 334 U.S. 1.

The provisions of the due process clause restrain arbitrary and unreasonable exertions of power which are not really within lawful State power, since they are so unreasonable and unjust as to impair or destroy fundamental rights.

American Land Co. v. Zeiss, 219 U.S. 47, at page 66.

Due process is violated where a criminal conviction is obtained by the State through the presentation of testimony known by the prosecuting official to be perjured.

Pyle v. Knasas, 317 U.S. 213.

Mooney v. Holahan, 294 U.S. 103.

Shelley v. Kraemer, 334 U.S. 1, 16-17.

United States v. Barillas (2d Cir. 1961) 291 Fed. 2d 743.

Due process is violated where the State has suppressed material evidence favorable to the accused, and a resulting conviction.

Pyle v. Kansas, 317 U.S. 213.

> "The requirement of the Fourteenth Amendment is for a fair trial (Massey v. Moore, 348 U.S. 105, 108 (1954); the due process clause "prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right." (Betts v. Brady, 316 U.S. 455, 473 (1942)."

Brubaker v. Dickson (9th Cir. 1962) 310 Fed. 2d 30.

IV. The claim of State officers that they have "official immunity" because their acts, as they say, were "discretionary".

The word "discretion" in its essence means being faithful to ones duty or obligation. The word cannot encompass a "bad faith" act.

Here again, the dividing line, if one is to be cut in the Civil Rights Act, is an act committed"in good faith"; absence of fraud or corrupt purpose. See for definition of the word "discretion", Estate of Laundagin, 199 Cal. App. 2d 555, par. 3, 19 Cal. Rptr. 19.

> "...Every state or municipal office is a sanctuary...wherein should toil the standard-bearers of public virtue. An incumbent defiles himself and desecrates his office as would the priest at the alter when he...usurps the privileges of his watch-care. ..."

People v. Harby, 51 Cal. App. 2d 759, 125 P. 2d 874.

Every oppression against law, by color of any usurped authority is a kind of destruction...and it is worst oppression that is done by the color of justice. Lord Coke, Four centuries ago.

> "...They [state officials] know that they lack any mandate or authority to withhold the freedoms or deny liberty without due process of law in the course of their duties. They know that excessive or abusive use of authority

would only subvert the ends of justice. ..."

Screws v. United States, 325 U.S. 91.

No court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney.

Nadler v. Warner Co., 321 Pa. 139, 184 Atl. 3.

Agnew v. Superior Court, 156 Cal. App. 2d 838, 320 P. 2d 158.

Cf. Gebhardt v. United States Railways (Mo.) 220 S.W. 677, 9A.L.R. 1076.

In re Watson, 83 Neb. 211, 119 N.W. 451.

Russell v. Jackson, 125 A.L.R. page 530.

California Business & Professions Code, Section 6068(d).

It is no duty nor within the discretion of a prosecuting official to knowingly allow his witness to testify falsely.

People v. Davis, 48 Cal. 2d 241, page 257, 309 P. 2d 1, page 9.

Cf. People v. Diaz, 208 A.C.A. 40, par. 7, 24 Cal. Rptr. 887.

People v. Pike, 58 A.C. 69, page 96, 372 P. 2d 656.

People v. Williams, 57 Cal. 2d 263, 368 P. 2d 353.

Pickering v. State Bar, 24 Cal. 2d 141, 148 P. 2d 1.

> "Any act fitted to deceive is actual fraud."

People v. Wisecarver, 67 Cal. App. 2d 203, page 207,

The law does not contemplate the administration of official duty for the attainment of the officers' personal ends or to justify his selfish personal motives of spite, ill-will, revenge, greed or avarice. When an officer performs an act under color of his office with such motives as the actuating cause or clearly without any right to act, he is not acting within the scope of his authority and the cloak of his office furnishes him no protection from civil actions for an injury perpetrated. Hence, the question here is did these officials act in "good faith" and within the lawful scope of their authority in the performance of the duties of their respective offices. The answer to that question lies in the application of the facts appearing in the Amended Complaint. It is, of course, much simpler to baldly state a rule of immunity than to apply it. A delicate balance of interests, perhaps, should be applied if the Civil Rights Act be deemed not to have abrogated common law immunity. Every application of the so-called rule of immunity involves a determination of whether the desirable result of discouraging highhanded and oppressive action is outweighted by the remote risk of inhibiting and hamstringing those who, in good faith, energetically and objectively pursue their governmental duties. In such delicate area one should, perhaps for small wrongs, move slowly; it is not an area that lends itself to sweeping generalities or bald-faced claims of immunity.

Every case must be decided on its own merits.

There is a recognized rule (as distinguished from Statute imposed liability such as the Civil Rights Act) that as to a ministerial officer who acts wrongfully, although in good faith, he nevertheless is liable in an ordinary action and cannot claim the immunity of the sovereign.

Tracy v. Swartwout, 10 Pet. 80, 9 L.Ed. 354.

Little v. Barrene, 2 Cranch 170, 2 L.Ed. 243.

See Philadelphia Co. v. Stimson, 223 U.S. 605, 618 et seq.

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94.

Hopkins v. Clemson Agricultural College, 221 U.S. 636.

Sloan Shipyards v. United States Shipping Board Emergency Fleet Corp., 258 U.S. 549, 566-568.

Bates v. Clark, 95 U.S. 204.

Cammeyer v. Newton, 94 U.S. 225.

Belknap v. Schild, 161 U.S. 10.

Scheer v. Moody (D.C. Mont.) 48 Fed. 2d 327.

There is also a general rule that if any officer- ministerial or otherwise- acts outside the scope of his jurisdiction and without authorization of law, he is liable in an action for damages resulting to another.

Bradley v. Fisher, 80 U.S. 335, 351-352.

Overmyer v. Barnett, 70 Ind. App. 569, 123 N.E. 654.

Russell v. Considine, 101 Kan. 631, 635-1, 636, 168 P. 1095.

Ray v. Dodd, 132 Mo. App. 444, 112 S.W. 2.

Farish v. Smoot (Fla.) 58 So. 2d 534.

In Sharp v. Lucky, 252 Fed. 2d 910, the Register of Voters was held liable under the Civil Rights Act. Cf. Morgan v. Null (D.C. N.Y. 1953) 117 Fed. Supp. 11, page 16.

McShane v. Moldovan, 172 Fed. 2d 1016.

Marshal v. Sawyer, 301 Fed. 2d 639.

Burt v. City of New York (2d Cir. 1946) 156 Fed. 2d 791.

Lewis v. Brautigan, 227 Fed. 2d 124.

Monroe v. Pape, 365 U.S. 167.

Koch v. Zuieback, 194 Fed. Supp. 651, page 657.

In Ghadiali v. Deleware State Medical Society (D.C. D.Del. 1939) 28 Fed. Supp. 841, the named defendants were various members of the state medical society, two officials attached to the office of the Attorney General of the State of Deleware, and others being police officers, the suit being one under the Civil Rights Act for infringing and threatening and conspiring to infringe on the right of the plaintiff to speak and lecture freely. Defendants moved dismissal of the amended complaint on various grounds but the court denied the motion, holding that plaintiff was properly before the court.

In Ampey v. Thorton (D.C. Minn. 1946) 65 Fed. Supp. 216, an F. B. I. Agent, in the course of tracking down a fugitive from justice, called a neighbor of the fugitive

a vile name; the neighbor sued for slander. Said the court in denying the officers motion to remove the state action to the federal court for trial:

> "...It cannot be claimed here that calling plaintiff a "bitch" was part of the official acts of defendant or that the nature of his official duties would be a justification thereof. ..."

In Scheer v. Moody, 48 Fed. 2d 327, at page 330, the court stated:

> "Unless justified by some constitutional statute, a government officer or employee acts at his peril and personally pays for his wrongs- a salutary principle necessary to discourage abuse of power, that official power which the great Marshall declared would be abused wherever authority was reposed. And suits against any such trespasser are not against the United States. Rather do they serve the United States to discipline its derelict agent whose excesses tend to defeat its obligations and to bring it into disrepute. (citations)."

There was never any exemption from suit under the common law of England as to persons lower than a sovereign and his ministers of justice; ordinary officers never did have exemption from suit for their wrongs.

"...Public employment is no defense to the employee for having converted the private property of another to the public use without his consent and without just compensation. Private property, the Constitution provides, shall not be taken for public use without just compensation; and it is clear that provision is as applicable to the government as to individuals, except in cases of extreme necessity in time of war and of immediate and impending public danger. ..."

Cammeyer v. Newton, 94 U.S. 225, at page 234.

Bates v. Clark, 95 U.S. 204, at page 209.

"...But immunity from suit is a high attribute of sovereignty- a perogative of the State itself- which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless

they are to be put above the law. For how "can the principles of individual liberty and right be maintained if, when violated,, the judicial tribunals are forbidden to visit penalties upon individual defendants... whenever they interpose the shield of the State. ..."

Hopkins v. Clemson College, 221 U.S. 636.

"But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. (citation). Such officers or agents, although acting under order of the United States, are therefore personally liable to be sued for their own infringement of a patent. (Citing cases)."

Belknap v. Schild (1895) 161 U.S. 10, at page 18.

"...That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to

a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. ...Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. ..."

School of Magnetic Healing v. McAnnulty, 187 U.S. 94, at 108.

"...They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign properly called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amendable to the law. If he is sued for conduct harmful to the plaintiff his only

shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts. (citations). ...The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. ..."

Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549, 566, 567, 568.

"...The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the

executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation. These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. ...<u>No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity</u>. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes

upon the exercise of the authority which it gives. ..."

United States v. Lee, 106 U.S. 196, at page 220.

Cf. Stanley v. Schwalby, 147 U.S. 508, at page 518.

Osborn v. United States, 22 U.S. 738, 842-843.

V. Concerning the liability of the two corporate defendants.

By the action of the lower District Court in ordering the Amended Complaint dismissed with prejudice "as to all defendants except Moody and Rhodes", and the following Order dismissing the Action, appellant thus was foreclosed from redress as to the two corporate defendants, and even by a further amended complaint if such was required.

A private person may be sued under the Civil Rights Act if he aid an officer to commit the wrongful act.

United States v. Trierweiler, 52 Fed. Supp. 4.

Williams v. United States, 179 Fed. 2d 644; and 656.

Haggerty v. United States, 5 Fed. 2d 224.

United States v. Orr, 223 Fed. 220.

Valle v. Stengel, 176 Fed. 2d 697.

McShane v. Moldovan, 172 Fed. 2d 1016.

Picking v. Pennsylvania R. Co., 151 Fed. 2d 240, cert. den. 332 U.S. 776.

Robeson v. Fanelli, 94 Fed. Supp. 62.

Watkins v. Oaklawn Jockey Club, 86 Fed. Supp. 1016;

"...Unlike, e.g., 42 U.S.C. Section 1983 Section 1985(3) is not specifically limited to acts committed "under color of" state law; rather, the actual language of the statute suggests that it applies in any situation where any two or more persons, be they individuals, state officials or federal officers, conspire to deprive any person of equal protection of the laws or of equal privileges and immunities under the law. ..."

Koch v. Zuieback (D.C.S.D. Cal. 1961) 194 Fed. Supp. 651, at page 657.

The two corporate defendants having been engaged for government project activity, and having been actually so engaged, are liable for their wrongful acts under the Civil Rights Act, and as well would be liable in an ordinary action for conspiracy.

See Baldwin v. Morgan, 251 Fed. 2d 780.

Adams v. City of Park Ridge, 293 Fed. 2d 585.

Cf. Dankersley v. Low & Watson Construction Co., 166 Cal. App. 2d 815, 333 P. 2d 765.

CONCLUSION

The Orders of the lower District Court being in error should each be reversed, and costs incurred herein granted appellant.

R. W. AGNEW
Appellant, Pro Se.

No. 18541

In the
United States Court of Appeal
For the Ninth Circuit

R. W. AGNEW,

Plaintiff and Appellant,

vs.

RICHARD W. MOODY, MACK E. RHODES, CHARLES B. RUSSELL, ELBERT E. STANFORD, B. C. ESTES, WILLIAM H. PARKER, RICHARD LASKIN, ROGER ARNEBERGH, PHILIP GREY, EDWARD L. DAVENPORT, ROBERT L. BURNS, WILLIAM B. BURGE, WILLIAM DORAN, NORMAN TULIN, HOWARD H. SCHMIDT, CHARLES HURD, CLARA CLAPP, G. VELLA CONSTRUCTION COMPANY, a corporation, DOMINIC GIANGREGORIO CONCRETE CONSTRUCTION COMPANY, a corporation,

Defendants and Appellees.

Appellees' Brief

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Defendants and Appellees.

No. 18541

Appellees' Reply Brief

STATEMENT OF THE CASE

The record before this Honorable Court discloses that the plaintiff in error, Mr. Agnew appeals from:

(1) the order of November 5, 1962 dismissing the Amended Complaint with prejudice as to all defendants except defendants MOODY and RHODES, and as to defendants MOODY and RHODES dismissing

the Amended Complaint without prejudice with leave to plaintiff to amend within twenty days; and from

(2) the Order dismissing the action, entered on February 12, 1962 (Clerk's transcript, page 122).

This action arose when the appellant received a traffic ticket issued by the Los Angeles Police Department. The matter went to trial in the Los Angeles Municipal Court before the defendant HOWARD SCHMIDT, Judge of said court. After a lengthy trial, the appellant was convicted and an appeal was taken to the Appellate Department of the Superior Court wherein the appellant urged each point herein raised by the Amended Complaint. The Appellate Department unanimously affirmed the Judgment of conviction without an opinion. Prior to execution of sentence, Mr. Justice Douglass of the United States Superior Court issued a stay order pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court.

The present action was filed during the course of the Municipal Court proceedings. This Honorable Court is respectfully requested to take Judicial Notice of the records and files of the Los Angeles Municipal Court Action No. 760466 entitled *People of the State of California v. R. W. Agnew.* Said records are currently before the United States Supreme Court in the aforementioned Petition for Writ of Certiorari in *Agnew v. California.*

The Amended Complaint in the case at bar clearly discloses that the appellee HOWARD H. SCHMIDT is a Judge of the Municipal Court of Los Angeles Judicial District. Appellee NORMAN TULIN is an official Court Reporter of said Municipal Court. (Clerk's transcript, page 2) Both aforementioned appellees appeared in the case at bar by moving to dismiss the amended complaint. The appellees CLARA CLAPP and CHARLES HURD are the duly appointed Clerk and Bailiff of said court. The Amended Complaint was dismissed before either defendant appeared.

The issues presented as to appellees SCHMIDT and TULIN are:

(1) whether the Amended Complaint violated Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE. [28 U.S.C.A.]; and

(2) whether or not they are entitled to immunity from prosecution.

I.

THE DISTRICT COURT PROPERLY DISMISSED THE AMENDED COMPLAINT SINCE SAID COMPLAINT VIOLATED RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE [28 U.S.C.A.]

Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE requires ". . .

> (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . ." [28 U.S.C.A.]

In the case at bar the appellant R. W. Agnew filed an Amended Complaint consisting of fifty-five pages containing eighty-one paragraphs. The complaint rambled on in narrative fashion and attempted to set forth three causes of action under the Federal Civil Rights Act, to wit: 42 USC 1983; 42 USC 1985; and 42 USC 1986, against nineteen defendants.

A. It is elementary that only well pleaded and material allegations of a complaint are assumed to be true, while Conclusions of law and unwarranted deductions of fact are not admitted on the hearing of a motion to dismiss.

John and Sal's Automotive Service Inc. v. Sinclair Refining Co., D.C.N.Y., 1959, 177 F Supp. 201.

B. Judicial notice may be taken of a fact to show that a complaint does not state a cause of action.

Sears, Roebuck and Co. v. Metropolitan Engravers, Limited, C.A. 9th Circ. Cal. 1957, 245 F. 2d 67;

Yudin v. Carrol, D.C. Ark., 1944, 57 F. Supp. 793.

The District Court was entitled to look to the records and files of the Los Angeles Municipal Court in considering the appellee's motion to dismiss.

C. The Amended Complaint filed by the plaintiff in error is a clear violation of the rule that a short and concise statement must be pleaded.

Federal Rules of Civil Procedure, Rule 8 [28 U.S.C.A.].

In ruling on the Motions to Dismiss in the case at bar, the court said,

"THE COURT: Well, Mr. Agnew, I have gone over the complaint, the pleadings. I am going to dismiss the complaint in its entirety because you have failed to comply with Rule 8, in failing to file a short and plain statement. Also I am going to dismiss with prejudice as to all defendants other than Moody and Rhodes, who are the police officers who stopped you, and I will dismiss without prejudice as to them. You may be able to state a cause of action against the officers who stopped you, but you certainly cannot state a cause of ac-

> tion against a judge, the United States Attorney, or the court reporter, or the marshal, or anybody else. The action will be dismissed, the complaint will be dismissed in its entirety for the failure to comply with Rule 8, Subdivision A. The dismissal will be with prejudice to all defendants except the two police officers, Moody and Rhodes, and that will be without prejudice, so if the plaintiff wants to file a complaint against Moody and Rhodes and comply with the rule, I will be glad to hear it." (Rep. Tr., page 14, l. 17 to page 15 l. 10).

A failure to comply with Rule 8 *Federal Rules of Civil Procedure* [28 U.S.C.A.] makes the complaint in issue subject to a motion to dismiss. As was held in *Condol v. Baltimore and Ohio Railroad Co., et al.*, C.A.D.C., 1952, 199 F. 2d 400 at page 402:

> "Condol's complaint fills twelve pages of the printed appendix which is before us and contains 45 numbered paragraphs. It is a tedious recital of evidential matter and falls far short of being the crisp statement which for the Rule requires. In a case as simple as this one, there is no justification for such a complaint and a defendant should not be required to plead to it."

Taylor v. United States Board of Parole C.A.D.C. 1951, 194 F. 2d 882;

McCann v. Clark C.A.D.C. 1951, 191 F. 2d 476.

So too, the appellant's complaint not only violated the rule of the *Condol* case (supra) but also disclosed

the fact that the majority of defendants were entitled to Immunity.

The Amended Complaint could not have been amended further so as to rob these defendants of the immunity granted to them. Therefore, the District Court in exercising its discretion, had every right to dismiss the Amended Complaint with prejudice as to all parties except MOODY and RHODES. Leave to amend need not be granted where such would serve no useful purpose.

In *Lone Star Motor Import Inc. v. Citroen Cars Corp.,* C.A. 5th Circ. 1961, 288 F. 2d 69 the court held at page 77:

> "In most of such cases the unsuccessful plaintiff or defendant must be given an opportunity of filing an amendment *unless it appears reasonably certain under the accepted test no evidence is available to make out a claim or defense."* (Emphasis Added)

The District Court, in dismissing the Amended Complaint in the case at bar, informed the appellant why the said complaint was being dismissed (Clerk's transcript, page 120). This case is consistent with the holding in *Bananno v. Thomas,* C.A. 9th Circ. 1962, 309 F. 2d 320 where this Honorable court said at page 322:

> "Moreover, if this complaint was dismissed for failure to state a claim on which relief could be granted, leave should have been granted to amend

> unless the court determined that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. We find no indication of such a determination in this record. It is of no consequence that no request to amend the pleading was made in the district court. *Sidebotham v. Robison,* 9 Cir., 216 F. 2d 816, 826."

The record in the present action clearly indicates that the appellant could not possibly cure the defects contained in the Amended Complaint.

II.

APPELLEES SCHMIDT AND TULIN ARE ENTITLED TO JUDICIAL IMMUNITY.

A. As to the Appellee HOWARD H. SCHMIDT, the case authority is legion to the effect that judges of courts are entitled to judicial immunity.

The affidavit of HOWARD H. SCHMIDT discloses that said appellee is a Judge of the Municipal Court of Los Angeles Judicial District (Clerk's Transcript, Page 78). Said appellee is referred to in the Amended Complaint in the case at bar as the Judge who presided in appellant's criminal trial.

The immunity granted to Judges of Courts extends to causes of action based on the Federal Civil Rights Act [42 U.S.C.A.].

In *Perkins v. Rich,* D.C. Del. 1962, 204 F. Supp. 98 Senior District Judge Rodney said at page 101:

> "The plaintiff in some light way indicated reliance upon the Civil Rights Act, 42 U.S.C.A., 1981, 1983. Without at all conceding that the indicated facts show any cause of action under the cited Act, I am of the opinion that the principle of judicial immunity has equal application under that Act as in other appropriate cases . . . "

An even stronger holding is found in *Rudnicki v. McCormack,* D.C. R.I., 1962, 210 F. Supp. 905 at page 907. There it was held:

> "Insofar as the judicial defendants are concerned, it has long been settled that judges, both state and federal, are immune from civil liability for their judicial acts (cases cited). This immunity extends to suits, such as the present ones, for alleged deprivation of civil rights under the Civil Rights Act . . . "

The cases of judicial immunity turn on whether or not the named defendant judge was exercising or performing a "judicial function" at the time the alleged cause of action arose. If the defendant was so performing, then immunity attached.

In *Yates v. Village of Hoffman Estates,* D.C. Ill. 1962, 209 F. Supp. 757, the District Court brought the issue of judicial immunity into sharp focus, and set down the doctrine of "judicial function."

The court held at page 747:

> "A judge must be free from concern that civil liability will be sought by an unsuccessful litigant

who ascribes his misfortune to judicial malice and corruption. *Bradley v. Fisher,* 1871, 80 U.S. (13 Wall) 335, 348, 20 L. Ed. 646. Similarly, judicial independence requires immunity from civil liability resulting from the multitude of procedural decisions which must necessarily be rendered in each case heard. (c.f. 68 *Harv. L. Rev.* 1229, 1237, (1955)), even though a particular decision is erroneous (c.f. *Ryan v. Scoggin,* 10th Cir. 1957, 245 F. 2d 54, 58 (dictum)), or even malicious (cases cited).

"However, not every action by a judge is in exercise of his judicial function. For example, it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse. . . . "

The appellant urges three points in support of the proposition that the appellee SCHMIDT is not entitled to judicial immunity:

1. That the Civil Rights Act recognizes no judicial immunity; and
2. That even if the Civil Rights Act has not abrogated the Common Law, Judicial Immunity, there is no immunity for "extraordinary" wrongful acts; and
3. That this appellee lost jurisdiction upon the filing of a Declaration of Bias and Prejudice under California Code of Civil Procedure, Section 170, Subdivision 5.

The appellant's first point, to wit: That the Civil Rights Act does not recognize judicial immunity has

been answered heretofore, and said point on appeal is clearly without merit.

The appellant's second point, to wit: That the principle of judicial immunity does not cover "extraordinary" acts, appears to be a creature of the appellant's own imagination. The appellant in Appellant's Opening Brief, page 39, Lines 18-23 states the following:

> "There are cases which deride the *Picking* case, supra, 151 Fed. 2d, 240 and make claim that complete judicial immunity even for extraordinary wrongful acts is a 'necessity' for operation of the courts. Then, *this is, of course, especially as to extraordinary wrongful acts simply not so. . . .* " (Emphasis added).

This appellee submits that there is no authority for said proposition.

Appellant's third point, to wit: That the appellee HOWARD H. SCHMIDT lost jurisdiction upon the filing of a Declaration of Bias and Prejudice under the Code of Civil Procedure, Section 170, Subdivision 5 is likewise without merit. The case law stands for the proposition that if a judge has jurisdiction of subject matter of the action and jurisdiction of the person of the defendant, then immunity attaches once and for all, and even wrongful decisions will not deprive said judge of the immunity to which he is rightfully entitled.

> *Yates v. Village of Hoffman Estates,* Ill. (supra).

By way of illustration this appellee wishes to point out to the court the appellant's statement contained in the Appellant's Opening Brief at the last line of Page 21 over to Page 22, Line 6, wherein the following is found:

> "It would be appropriate to point out also that the Reporter's Transcript discloses a bias and prejudice bordering on animosity on the part of Judge Westover toward plaintiff, because, apparently, plaintiff had the gall to apear before the judge in his court in *propria persona,* and in response to questions of the judge make answer as to opinion of the law as a layman. . . ."

For other cases treating the subject of Judicial Immunity, see:

Saier v. State Bar of Michigan, C.A. 6th Cir. 1961, 293 F. 2d 756;
Yaselli v. Goff, C.A. 2d Cir. 1926, 12 F. 2d 396;
Nicklaus v. Simmons, D.C. Neb. 1961, 196 F. Supp. 691;
Cahn v. International Ladies' Garment Union, D.C. Penn. 1962, 203 F. Supp. 191.

B. Appellee NORMAN TULIN, an official Court Reporter is entitled to Judicial Immunity.

A position of Court Reporter partakes the nature of a public office and as such any duties imposed on such office are owed to the public at large and not to private individuals.

The attention of the Court is directed to the case of *Peckham v. Scanlon,* C.A. 7th Cir. 1957, 241 F. 2d 761 wherein is found a set of facts much the same as those in the case at bar. The plaintiff in the *Peckham* case, (supra) sought to recover under the Civil Rights Act, (42 U.S.C.A.) 1983 and 1985. One of the offenses alleged was that the Court Reporter, one Kaylor, failed and refused to prepare a transcript for a criminal defendant. The court stated at page 763 "It is also our view that Kaylor is immune from prosecution under the Civil Rights Act."

CONCLUSION

This Honorable Court is respectfully requested to affirm the order of the District Court dismissing the action as to the Appellees SCHMIDT AND TULIN. This Court is further requested to affirm the Order of the District Court dismissing *sua sponte* the action as to Defendants HURD and CLAPP. The appellees request also that they be granted costs incurred herein.

HAROLD W. KENNEDY,
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JOHN J. COLLINS,
Deputy County Counsel
Attorneys for Appellees
Schmidt and Tulin.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HAROLD W. KENNEDY, County Counsel

and

JOHN J. COLLINS, Deputy County Counsel

Attorneys for Appellees Schmidt and Tulin.

Service of the within and receipt of three copies thereof are hereby admitted this.....day of June, A.D., 1963.

.....

.....

No. 18541

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. W. AGNEW,

Appellant,

vs.

RICHARD W. MOODY, MACK E. RHODES, RICHARD LASKIN, WILLIAM B. BURGE, WILLIAM DORAN, *et al.*,

Appellees.

APPELLEES' REPLY BRIEF.

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Appellees.

APPELLEES' REPLY BRIEF.

Questions Presented.

I.

Whether the amended complaint filed in this action contained a short and plain statement of the claim showing that the pleader is entitled to relief as required by Rule 8(a) of the Federal Rules of Civil Procedure.

II.

Whether the amended complaint was properly dismissed as to Appellees Richard W. Moody and Mack E. Rhodes after the Appellant failed to comply with the Order of the lower Court to amend his amended complaint within twenty days.

III.

Whether the amended complaint as to Appellees Richard Laskin, William B. Burge and William Doran was properly dismissed because they are immune by reason of the quasi judicial privilege.

Summary of Argument.

I.

Appellant failed to file a complaint which contained a short and plain statement of the claim.

II.

Appellant refused to comply with the Order of the District Court that if he wished to file an amended complaint as to Appellees Richard W. Moody and Mack E. Rhodes, that he do so within twenty days.

III.

The Appellees Richard Laskin, William B. Burge and William Doran were Deputy City Attorneys of the City of Los Angeles at all times mentioned in the amended complaint, and as such, they are immune from liability for the activities which are alleged in the amended complaint.

ARGUMENT.

I.

Appellant Failed to File a Complaint Which Contained a Short and Plain Statement of the Claim.

The Appellant has cited many cases and quoted language from these cases in support of his premise that the amended complaint is a short and plain statement of the claim. In many instances the language quoted is an accurate statement of the law and what the cases held. However, in the case at bar, an examination of the fifty-seven page amended complaint is all that is necessary to see that the amended complaint is contrary to Rule 8(a) of the Federal Rules of Civil Procedure.

Mr. Agnew on page 11 of Appellant's Opening Brief demonstrates that he is able to make a short and plain statement of his claim when he summarized for this Honorable Court what the amended complaint in the case at bar alleged.

While it is true that there are nineteen defendants in the case at bar, these defendants all fall into one of four groups. One group of defendants are police officers; another group of defendants are Deputy City Attorneys; still another group are defendants connected with the judicial process which tried Mr. Agnew in the Municipal Court—while the last group of defendants are in the construction business. So it is not as if the Appellant was presented in the case at bar with the task of alleging claims against nineteen diverse defendants.

It is interesting to note that in most of the cases cited by the Appellant in connection with his Argument that the amended complaint is a short and plain statement of a claim, are cases wherein the Court dismissed the complaint with prejudice. In the case at bar the amended complaint was dismissed as to all defendants because it failed to state a short and plain claim, but it was not dismissed with prejudice as to all defendants [Rep. Tr. p. 14, line 17, to p. 15, line 10]. In the case at bar it is clear from the language of the District Court that the amended complaint was dismissed as to the defendants other than Richard W. Moody and Mack E. Rhodes with prejudice on the grounds of immunity [Rep. Tr. p. 14, line 17, to p. 15, line 10]. Therefore, the many cases cited by the Appellant in support of his premise that there was a short and plain statement of a claim are not applicable in most part as to the Appellees Richard W. Moody and Mack E. Rhodes.

The Appellees do not believe it is necessary that the amended complaint be analyzed paragraph by paragraph to indicate the verboseness and unclearness of the amended complaint in order to substantiate the ruling of the Federal District Court in the case at bar that the amended complaint was in violation of Rule 8(a) of the Federal Rules of Civil Procedure.

If this rule is to be given any effect or meaning, the ruling of the Federal District Court must be affirmed by this Honorable Court.

II.

Appellant Refused to Comply With the Order of the Court That if He Wished to File an Amended Complaint as to Appellees Richard W. Moody and Mack E. Rhodes That He Do so Within Twenty Days.

The District Court in the case at bar on November 2, 1962, issued an Order granting the Appellant twenty days leave to amend his complaint as against Richard W. Moody and Mack E. Rhodes [Tr. p. 120]. Mr. Agnew, up to the present time, has never filed an amendment to the amended complaint that is on file in the case at bar. It is apparent from the various notices of appeal that were filed by the Appellant almost immediately after the above Order of the District Court was filed, that he never intended to follow that Order.

In the case at bar the Federal District Court waited until February 11, 1913, before filing its Order dismissing the action which allowed the Appellant over three (3) months within which to file his amendment to the amended complaint [Tr. p. 117].

The case of *Link v. Wabash R. Co.,* 370 U. S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, is the latest case of the United States Supreme Court which discusses the power and authority of a Federal trial court to dismiss an action for failure of a plaintiff to prosecute or to comply with an Order of the Court.

Commencing on page 737 of the Lawyer's Edition of the above case, the Court stated:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of

his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law, e.g., 3 Blackstone, Commentaries (1768), 295-296, and dismissals for want of prosecution of bills in equity, e.g., id., at 451. It has been expressly recognized in Federal Rules of Civil Procedure 41 (b), which provides, in pertinent part:

"'(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.'

"Petitioner contends that the language of this Rule, by negative implication, prohibits involuntary dismissals for failure of the plaintiff to prosecute *except* upon motion by the defendant. In the present case there was no such motion.

"We do not read Rule 41 (b) as implying any such restriction. Neither the permissible language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to

abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even from language in this Court's opinion in *Redfield v. Ystalyfera Iron Co.,* 110 U. S. 174, 176, 28 L. ed. 109, 110, 3 S. Ct. 570. It also has the sanction of wide usage among the District Courts. It would require a much clearer expression of purpose than Rule 41 (b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.

"Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' *Anderson Nat. Bank v. Luckett,* 321 U.S. 233, 246, 88 L ed 692, 705, 64 S Ct 599, 151 ALR 824. But this does not mean that every order entered without notice and a preliminary adversary hearing of-

fends due process. The adequacy of notice and hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

"In addition, the availability of a corrective remedy such as is provided by Federal Rules of Civil Procedure 60 (b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders the lack of prior notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60 (b).

"Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion."

The most recent case dealing with a similar set of facts as the case at bar is the case of *Maddox v. Shroyer,* 302 F. 2d 903. In that case the Court dismissed the complaint because of the failure of the plaintiff to follow the direction of the District Court to amend his complaint because he failed to file a short and plain statement of the claim. In that case also,

like the case at bar, the plaintiff appeared to flagrantly disregard the Order of the trial Court.

Another case that the Appellees wish to bring to the attention of this Honorable Court is the case of *Thompson v. Johnson,* 253 F. 2d 43. This case affirmed the dismissal of the lower trial Court when the plaintiff failed to amend his complaint after the trial Court so ordered.

These cases above cited by the Appellees are clear and show that the Order of the trial Court of the case at bar dismissing the action as against Richard W. Moody and Mack E. Rhodes was proper. Any further discussion of the facts of the case at bar and the above cited cases would be superfluous.

III.

The Appellees Richard Laskin, William B. Burge and William Doran Were Deputy City Attorneys of the City of Los Angeles at All Times Mentioned in the Amended Complaint and as Such They Are Immune From Liability for the Activities Which Are Alleged in the Amended Complaint.

The Appellee's Reply Brief will not attempt to discuss or differentiate all of the cases that have been cited by the Appellant in the Appellant's Opening Brief which he contends are relevant cases dealing with the question of immunity as to these Appellees.

The case of *Kenney v. Fox,* 232 F. 2d 288, is in the opinion of the Appellees a proper starting point for the discussion of immunity of quasi judicial officers. In the *Kenney* case the Court discusses both the questions of whether the immunity of judicial of-

ficers has been abrogated by the Civil Rights Act and the availability of immunity to quasi judicial officers.

The Appellant seemingly adopts the position that the Civil Rights Act has abrogated the immunity of judicial officers (Appellant's Op. Br. p. 37). Appellant relies on the cases of *Picking v. Penn R. Co.,* 151 F. 2d 240 and *McShane v. Moldovan,* 172 F. 2d 1016, amongst other cases, in support of his contentions. Both of these cases, *Picking v. Penn. R. Co. (supra)* and *McShane v. Moldovan (supra),* were interpreted by the *Kenney v. Fox,* 232 F. 2d 288, case, in light of the later Supreme Court case of *Tenney v. Brandhove,* 341 U. S. 367, 71 S. Ct. 783, 95 L. ed. 1019. After analyzing all three cases, the Court in *Kenney v. Fox* (*supra*), said:

> "We are of firm opinion that the common law rule of immunity of a judicial officer for acts done in the exercise of his judicial function where he has jurisdiction over both parties and the subject matter, has not been abrogated by the Civil Rights Act."

The Court in *Kenney v. Fox,* 232 F. 2d 288, along with deciding that the Civil Rights Act did not abrogate the Doctrine of Judicial Immunity, held at page 290 that:

> "A prosecuting attorney is a quasi judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation."

The Doctrine of Judicial Immunity was last discussed by the Supreme Court of the United States in the case of *Barr v. Matteo,* 360 U. S. 564, 79 S. Ct. 1335, ... L. ed. 2d 1434, when the Court at page 1440 of the Lawyer's Edition, held:

> "This court early held that judges of courts of Superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed, Bradley v. Fisher (US) 13 Wall 335, 20 L ed 646, and that a like immunity extends to other officers of government whose duties are related to the judicial process. Yaselli v Goff (CA2 NY) 12 F2d 393, 56 ALR 1239, affd per curiam 275 US 503, 72 L ed 395, 48 S Ct 155, involving a Special Assistant to the Attorney General."

The reasons for the immunity from liability that is extended to quasi judicial officers, and those in like circumstances, has been discussed in many leading cases and the arguments in support of the quasi judicial immunity are repeated throughout the case of *Barr v. Matteo (supra)*, and the Appellees, rather than repeat the language of the Supreme Court, refer this Court to that case.

A later case which involved prosecuting attorneys and is applicable to the case at bar is *Simons v. O'Connor,* 187 Fed. Supp. 702, where the Court at page 704 held:

> "To the extent that plaintiff's claim is predicated upon alleged bad faith or malice, it is in-

> sufficient to support a recovery. In *Morgan v. Sylvester,* 2 Cir., 1955, 220 F. 2d 758, dismissal of a complaint brought under 42 U.S.C.A. §§ 1983, 1985, against state judicial, quasi-judicial, and legislative officers, alleging that they maliciously and corruptly conspired to deprive plaintiff of her constitutional rights was affirmed by the Court of Appeals 'on authority of Gregoire v. Biddle, 2 Cir., 177 F. 2d 579 and Tenney v. Brandhove, 341 U. S. 367, 71 S. Ct. 783, 95 L. ed. 1019.'"

The Appellees are not unmindful of the case of *Marshall v. Sawyer,* 301 F. 2d 639, which was decided by this Honorable Court, and which is cited by the Appellant on page 39 of Appellant's Opening Brief. It is clear from the short space allotted by the Appellant in his Opening Brief to this case that he too, like the Appellees, does not feel that it was a case wherein the question of immunity was raised.

It appears to the Appellees that in the *Marshall v. Sawyer (supra)* the question of immunity was not raised by either side. The important question for decision in that case was the abstention doctrine, and the elements of a Civil Rights Act damage case.

The interpretation of *Marshall v. Sawyer,* 301 F. 2d 639 that is given to it by the Appellees is somewhat the same position that the Court in *Kenney v. Fox (supra)* gave to the case of *McShane v. Moldovan,* 172 F. 2d 1016, where it discusses the *McShane* case on page 293 of the *Kenney v. Fox* case, as follows:

> "The important question for decision in the McShane case was, as stated by the court, 172 F. 2d at page 1019, 'whether the allegations of the com-

plaint disclosed that appellees, in their alleged conduct, acted under "color of law" '. The Picking opinion was cited as bearing on that question, not on the question of judicial immunity. Although a justice of the peace was one of the defendants in the McShane case, the case involved an alleged conspiracy among the justice of the peace, a complaining witness, a constable and others. The defendants were considered as a group of conspirators, with no separate consideration being given to them individually. The question of judicial immunity was not discussed; apparently it was not raised by the defendant justice of the peace. In any event, any implied ruling on the question of judicial immunity in a case not involving a conspiracy must yield to the later ruling of the Supreme Court in Tenney v. Brandhove, supra."

Conclusion.

For the reasons hereinabove advanced it is respectfully submitted that the Order of the Federal District Court dismissing the Appellant's amended complaint should be affirmed.

Respectfully submitted,

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BOURKE JONES,
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Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN A. DALY

No. 18542

In the

United States Court of Appeals

For the Ninth Circuit

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, ETC., et al.,
Defendants-Appellants,

vs.

JOHN J. KING, EARL N. ANDERSON, et al.,
Plaintiffs-Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division

Appellants' Reply Brief

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SUBJECT INDEX

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Appellants' Reply Brief

After a separation of the wheat from the chaff in appellees' brief, which involves an unravelling of appellees' *ad hominem* assertions interwoven into much of their argument from the substance of the argument itself, appellees' case boils down to a contention that the provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) are applicable to actions of a union and its officers in terminating an employment relationship with the union where the employee is also a union member.

Specifically, the appellees assert (1) that a union may not terminate the employment of an employee of a union who is also a union member except in accordance with the provisions of Section 101(a)(5) of the LMRDA, and (2) that the termination of the employment of a union member

based upon political activity of that member within the union violates the rights conferred upon the member by Sections 101(a)(1), 101(a)(2) and 401 of the LMRDA.

On the other hand, the appellants assert that the LMRDA has no applicability to the relationship between a union and an employee of the union and does not restrict the union in any way either in the creation or the termination of the employment relationship regardless of whether the employee is or is not a union member.

There is thus presented to the Court a clear-cut issue of statutory construction to be determined upon the application of familiar legal principles utilized by courts in construing the intent of statutes. This determination does not, of course, turn on which of the membership rights are involved, as appellees seem to insist, nor does it turn upon any characterization or assessment of whether the union's action was or was not justified. Appellees' position is not aided by arguments ascribing various improprieties to the union just as appellants' position would not be aided by similar contentions concerning appellees. The Court is dealing with a broad principle that has application far beyond the confines of the particular factual setting.

In this connection, however, appellants observe that appellees err when they assert that appellants admit that the employment of the appellees with the union was terminated solely because of their activities in a union election in unsuccessful opposition to the IAM President (Appellees' Br. 5).[1] Counsel for appellants pointed out to the District Court (R. 148) that the complaint was before the Court on a mo-

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1. Appellees also err in their assertion (Appellees' Br. 3-4) that appellants caused spurious union charges to be filed against appellee Skagen and, contrary to prior consistent practice, refused the application of appellee Lindsey for early retirement and refused the application of appellee McGraw for disability retirement. The facts concerning these matters are set forth at page 8 of appellants' brief. The record references there cited make clear the inaccuracies in appellees' statement in their brief concerning these matters.

tion to dismiss and that "fairly analyzed" the complaint alleged such reason for termination. Under the circumstances, counsel felt obligated not to argue otherwise. However, counsel also spoke to the District Court as follows on this point: (R. 122-123)

> "Mr. Hickey: Actually, I should say this in complete fairness to my position: that there was no reason assigned to these men for the termination of their employment by the appointive authority in expressing the
> * * *
>
> "The Court: No, the indication that their terms would not be renewed, whatever it was, didn't say 'because you supported Brown.'
>
> "Mr. Hickey: That's correct, and I wouldn't want to leave the impression with the Court that I honestly feel that this union got rid of these men because of the mere fact that they supported an opposing candidate."

Nor do appellants agree that a termination of appellees' employment with the union for the reasons asserted by appellees constitutes invidious action or involves an assertion of Draconian power over its employees as appellees contend (Appellees' Br. 6), any more than it can properly be said that the administration of any organization at any level, from the Federal government to a small private club, is asserting any such power when it appoints individuals to carry out its policies who are in sympathy with such policies in whom it has confidence and trust. Far from being contrary to democratic principles as appellees contend, it is the very essence of democracy that elected officials of any private or political organization at any level have both the responsibility and the power of their positions and that the burden of the responsibility carries with it, the right to appoint subordinate officials to aid in the discharge of that responsibility who are in full and complete accord with the views of the elected officer.

At the same time, it is clear that whether a court agrees or disagrees with this view is not determinative of the issue here involved. For this reason, appellants do not believe that it would assist the Court in any way in determining the basic issue of statutory construction involved to make a point by point refutation of appellees' claims that appellants' case is founded on an "elaborate smoke screen"; upon "misstatements"; upon "mischaracterization"; upon "sustained camouflage"; upon Orwellian "doublethink" and similar colorful but wholly irrelevant characterizations. Suffice it to say that appellants' brief fully and accurately sets forth the allegations of the complaint and the union action which gave rise thereto (pages 3-7); sets forth verbatim appellees' statement of their basic position before the District Court (pages 12-13); and accurately quotes the basic findings of the District Court. Moreover, it does so without resort to invidious characterizations which appellees seem to believe are a substitute for legal argument.

Appellants now turn to a consideration of familiar principles of statutory construction applicable to the issue before this Court.

A. Recognized Principles of Statutory Construction Support Appellants' Position.

1. The Statutory Language.

Appellees lump together in one argument their contentions concerning the policy, legislative history, and the language of the LMRDA (Appellees' Br. 13-26). Appellees' discussion of the statutory language is confined to pages 15-18. It consists of quoting the various subsections of Section 101(a), Section 401, and Section 609 of the LMRDA; stating that these sections confer certain rights on members; that appellees as members exercised such rights; that the jobs of appellees with appellant union were terminated because they exercised these rights; that, therefore, the

appellants violated the LMRDA; and that the complaint alleging such facts sets forth a good cause of action.

The final step in this syllogism is, of course, the crucial one. It presents the question of whether the statutory language protects the member in the exercise of such rights both with respect to his future status as a union member and his future status as a union employee. Appellees' brief offers little or no help on this question. It does little more than berate appellants' argument and quote from the District Court's finding on what constitutes discipline.

Our position (Appellants' Br. 23-24) is that the statutory language speaks only of membership rights and that its fair import is that it protects the union member in the exercise of these rights against union action which affects his membership status. Conversely, it is our position that the statutory language does not speak of any right of a union member to hold a job with a union and contains no language indicating any statutory intent to protect jobs already held. Appellants cite the two Federal Court decisions which have specifically discussed the statutory language, including the Third Circuit decision in the *Sheridan* case, both of which support appellants' view (Appellants' Br. 23-25). Appellees cite only the District Court decision here under review.

Appellees contend that appellants' argument would write out of the statute membership rights for union employees and officers by, in effect, adding a qualification "except those who are employees or officers" after each reference in the statute to a "member". This they choose to describe as Orwellian "doublethink" (Appellees' Br. 17). Analysis very quickly demonstrates the fallacy inherent in appellees' contention. Appellants' construction clearly leaves every union member, including union employees or officers, free exercise every right guaranteed them by the statute and protects them in the exercise of such rights against any union action affecting their status as members. It simply asserts that if a union member is an employee of a union

or seeks to become an employee, the union's decision in hiring him or retaining him is not restricted by the statutory requirements upon which appellees rely.

Appellees also rely on the District Court finding of an "inextricable link" between a union member's status as a member and his status as an employee in the job of Grand Lodge Representative said to arise from the fact that he must be a member to qualify for such a job. However, union membership does not entitle the member to such a job and the union governing laws (R. 6, 7, 55) impose no restriction upon either the International President's choice of a representative or his replacement of a representative.

The appellees seek to avoid the problem posed for them by the statutory language by contending that they do not seek to vindicate any right to be Grand Lodge Representatives of the International Association of Machinists under the LMRDA nor do they assert that the LMRDA governs their employment relationship with the IAM. They argue that what they are seeking is a vindication of rights held as members and a protection from discipline labled against them because of an exercise of such rights (Appellees' Br. 11). However, the affidavits of the individual appellees (R. 68-87) show that the appellants took no action of any kind to prevent the appellees from engaging in political activity within the union or exercising any of the other rights provided for in the statute. Moreover, it is undisputed that the appellants have not taken any action of any kind against the appellees as members or which affects their membership status in any way. In addition, the complaint seeks a mandatory injunction restoring the appellees to their positions as Grand Lodge Representatives for an indefinite period of time and damages for the termination of this employment. It is therefore submitted that it is clear that appellees do seek to vindicate alleged job rights and clearly contend that the LMRDA protects them with respect to the jobs they held with the IAM.

2. Legislative History of the LMRDA.

Appellees are confronted with the problem that both the Conference Report and the LMRDA, as well as then Senator Kennedy's explanation of that Report to the Senate, clearly stated that the safeguards in Section 101 of the statute against improper discipline were intended to apply only to actions affecting a union member's status as a member (Appellants' Br. 25-29) and the further fact that the District Court's opinion does not reconcile its conclusions with this contrary legislative history (R. 87-96). Appellees seek to avoid this fatal blow to their theory of the statute by several arguments.

First: Appellees suggest that Senator Kennedy's interpretation of the Conference Report exceeds the import of said Report by going beyond mere suspensions (Appellees' Br. 19). However, in each of the cases cited by appellants at pages 27-29 of their brief, the Federal Court involved cited this legislative history for the proposition that provisions of the LMRDA relied upon by appellees do not protect union officers with respect to union action removing them from office.

Second: Appellees argue that the limitation upon the scope of the LMRDA provisions here involved relates only to cases where the officer has misappropriated or dissipated union funds (Appellees' Br. 27). Neither the Conference Report nor the cases cited by appellants, which rely upon such Report, so limit the area of union action with respect to officers or employees.

Third: Appellees argue that the cited legislative history does not support appellants' position because "neither the Conference Committee nor Senator Kennedy state, as they could so easily have done, that the rights elaborated in the LMRDA did not extend to members who were also officers or employees" (Appellees' Br. 19). Such argument demonstrates the same confusion as to appellants' position exhibited by appellees in their prior argument (page 17)

that acceptance of appellants' construction of the statute would read out of the statute the LMRDA protection for a member if he becomes a union employee or officer. As pointed out at page 5 above, we agree that such protection continues for union members with respect to their membership rights when they become union officers or employees. But we do not agree that the statutory protection extends to the officer status or the employment relationship. There was thus no occasion for either the Conference Report or Senator Kennedy to make the statement referred to by appellees. Instead, they made the statement that was appropriate, i.e. that the statutory safeguards were limited to a member's status as a member.

At page 40 of our brief we argue that there was an additional reason for lack of jurisdiction of the District Court over the alleged violation by the appellants of Section 401(e) of the LMRDA. This additional reason is that Section 402 of the statute confers exclusive jurisdiction upon the Secretary of Labor to enforce the provisions of Section 401. *Mamula v. United Steelworkers of America,* 304 F.2d 108 (3rd Cir., 1962).

Appellees devote considerable space in their brief in an effort to refute this argument (Appellees' Br. 23-26). The reason therefor is quite clear. Only in Section 401(e) of the statute is there any reference to "improper interference or reprisal of any kind" for voting or supporting a candidate or candidates in a union election. The reliance of appellees on this Section clearly indicates a lack of confidence on their part upon their arguments concerning Section 101. The basic position of the appellants that the statute is not intended to protect job rights is applicable to Section 401(e) as well as to Section 101. Appellants simply contend that, in addition, any rights that may be conferred by Section 401(e) must be enforced by the Secretary of Labor. In attempting to answer appellants' argument, the appellees for some reason choose to refer to the decision

of the *Mamula* case in the District Court rather than the decision in the Court of Appeals, erroneously stating that the appellants cited the District Court decision. The Third Circuit in the *Mamula* case reviewed the legislative history of Title IV, and particularly of Section 401, at some length and pointed out, among other things, that the provision in the House bill, which would have specifically permitted a member of a labor organization aggrieved by a violation of Section 401 to bring a civil action, was eliminated by the Conference Committee. The Third Circuit also quotes from the statement of then Senator Kennedy in reporting to the Senate on the Conference bill as calling attention to the fact that the House version, which would have substituted suits by individual union members for enforcement by the Secretary of Labor, had been stricken. The Court then spoke as follows on its interpretation that the enforcement of Section 401(c) was committed to the Secretary of Labor: (page 112)

> "Several recent district court decisions that have discussed the interplay between Titles I and IV, and the plaintiff's standing to bring this action are in accord with our conclusion. They are Colpo v. Highway Truck Drivers and Helpers, Local 107, 201 F. Supp. 307 (D. Del. 1961); Gammon v. International Ass'n of Machinists, 199 F. Supp. 433 (N.D. Ga. 1961); Acevedo v. Bookbinders and Machine Operators Local 25, 196 F. Supp. 308 (S.D. N.Y. 1961); Johnson v. San Diego Waiters & Bartenders Union Local 500, 190 F. Supp. 444 (S.D. Calif. 1961); Myers v. International Union of Operating Engineers, 40 CCH Labor Cases ¶ 66,436 (E.D. Mich. 1960); Byrd v. Archer, 38 CCH Labor Cases ¶ 66,083 (S.D. Calif. 1959)."

3. The Judicial Precedents.

Appellees seek to dismiss as inapplicable the cases cited in appellants' brief (pages 29-30) in support of appellants' construction of the statute upon the ground that they are irrelevant. They are irrelevant the appellees say because,

with the exception of the *Sheridan* case, they relate solely to termination for misfeasance in office or other situations where dismissal was ostensibly required by the LMRDA (Appellees' Br. 26). The *Sheridan* decision, they simply seek to disparage.

However, in each of the cases cited by appellants the court involved considered the precise issue here involved, i.e. whether the statutory provisions upon which appellees rely protected a union employee or officer in his employment or officer relations or were limited to actions affecting his membership status. Also, in each case the court held that such statutory provisions protected only a union member's status as a member.

Thus, *Sheridan* states (page 157) that neither the Bill of Rights provisions of the statute nor Section 609 protect status as a business agent. "It is the union-member relationship, not the union-officer or union-employee relationship, that is protected". The *Bennett* decision states (page 362) that the "Act was never intended to cover the relationship of employer and employee. The fact that plaintiff may have been a member of the defendant Union is incidental"; the *Vars* case states (page 243) that "it is clearly established that 29 U.S.C.A. Section 411 was not intended to protect officers from removal from office"; the *Cox* case states (page 449) that "the Act is intended to protect him (i.e. plaintiff) only in his rights as a member of the Union, and not as an officer of the District Council"; the *Mamula* decision states (page 350), that the court "must therefore conclude that the Landrum-Griffin Act deals with the union-member relationship and in no way supports jurisdiction of a suit involving the union-officer relationship"; the *Rinker* decision (page 206) states that "this statute deals with the union-member relationship and in no way supports jurisdiction of a suit involving the employer-employee relationship"; the *Hamilton* case (page 564) states that "the decisions in the cases heretofore decided under section 411(a)

(5) support this interpretation of the section", i.e. defendants' argument that the section applies only to discipline imposed upon members as members; the *Jackson* case (page 480) states that "the action of the Executive Board in removing him from that position (i.e. union Committeeman) does not give him any rights under 29 U.S.C.A. Section 411(a)(5)"; the *Strauss* case states (page 300) that Title I of the statute "deals with the union-member relationship and in no way supports jurisdiction of a suit involving the *employer* (union)-*employee* (business agent) relationship". (Emphasis the court's.)

In short, each of the precedents cited by appellants interpreted the statute contrary to the construction advocated by appellees. The argument of appellees that these holdings on the precise point at issue are irrelevant is like saying that nothing is relevant unless it supports appellees' view of the statute.

In contrast, none of the decisions cited by appellees considered and passed on the issue before this Court.

In *Salzhandler v. Caputo* (Appellees' Br. 27), the Second Circuit set forth the issue before it as follows: (page 446)

> "This appeal raises an important question of the rights of union members under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531: whether a union member's allegedly libelous statements regarding the handling of union funds by union officers justify disciplinary action against the member and his exclusion from any participation in the affairs of the union for five years, including speaking and voting at meetings and even attending meetings. We hold that the LMRDA protects the union member in the exercise of his right to make such charges without reprisal by the union; that any provisions of the union constitution which make such criticism, whether libelous or not, subject to union discipline are unenforceable; and that the Act allows redress for such unlawful treatment."

Nor is there any discussion in the opinion itself of the problem of statutory construction here involved.

The court in *Hamilton v. Guinan,* 199 F. Supp. 562 U.S. D.C. S.D. N.Y., 1961), spoke as follows of the *Salzhandler* case when it was before the District Court: (page 565)

> "The recent cases of Salzhandler v. Caputo, 4 CCH Lab.L.Rep. (43 Lab.Cas.) ¶ 17139 (S.D.N.Y. Aug. 3, 1961), and Rosen v. District Council 9, 198 F. Supp. 46, 4 CCH Lab.L.Rep. (43 Lab.Cas.) ¶ 17074 (S.D. N.Y. June 8, 1961), do not support plaintiff's position. In Salzhandler, the court denied a preliminary injunction on the ground that plaintiff had not shown that there was a reasonable probability that he would ultimately succeed in the action, since he had not exhausted his internal remedies and had not shown that the hearing was unfair. The court did not discuss the issue of jurisdiction under sections 411(a)(5) and 412, but since the discipline was imposed on plaintiff in part for acts taken as a member of the union, jurisdiction apparently would lie under section 412."

Nothing in the Second Circuit decision changes the accuracy of this conclusion.

Likewise, the *Detroy, Gross,* and *Rekant* cases, also cited by appellees (Appellees' Br. 29), did not involve the issue of whether Section 101 of the LMRDA extends to an employment relationship between the union and its employee who is also a union member. In each case, the union was affecting a privilege of membership based on a member-union relationship.

In contrast, in the present case the union acted as an employer toward appellees solely as employees. Any right appellees could have with respect to such action must be based on the law of employer-employee relationship and not the union-member relationship.

It is significant in assessing the applicability of appellees' citations to the issue here involved that Circuit Judge McLaughlin in his dissenting opinion in the *Sheridan* case

(306 F.2d 161-167), upon which appellees rely (Appellees' Br. 31), did not cite or rely upon the *Detroy, Gross,* or *Rekant* decisions, although they had been previously decided. Indeed, at pages 165-166, his opinion discusses the reported decisions and does not mention these cases. Nor is this omission inadvertent. In footnote 2, page 163, the opinion cites and quotes from *Detroy* on the exhaustion of remedy point there involved.

4. The Unreasonable and Discriminatory Results Produced by Appellees' Construction of the Statute.

Appellants argue (Appellants' Br. 40-42) that appellees' construction of the LMRDA produces unreasonable and discriminatory results by (1) encompassing within the coverage of the statute all clerical, custodial, professional or other jobs in which the union serves as employer and the employee happens to be a union member; (2) if literally applied, encompassing such jobs even if the employee was a member of another union; and (3) discriminating against union employees not union members. Appellants suggest that these consequences argue strongly against the construction advanced by appellees.

It is submitted that appellees' answer (Appellees' Br. 35) is in effect no answer. Appellees' suggestion that the union position is unreasonable and discriminatory as regards union employees because it does not extend LMRDA protection to a "union member simply because he is also a union employee" is, like all of appellees' arguments, founded on an erroneous premise. The union position obviously is not that the LMRDA is not applicable to a union member simply because he is also a union employee, but is that the statute does not protect jobs of a union employee, whether he is or is not a union member, because it was not intended to cover union employer-employee relationships.

5. Appellees' Construction of the Statute Would Create a Conflict with the Jurisdiction of the National Labor Relations Board.

Appellants argue in their brief that the construction of the LMRDA advanced by the appellees would create a dual jurisdiction with respect to the job rights of employees of unions generally and that such result militated against construing the LMRDA as appellees do (Appellants' Br. 42-43).[2]

In their brief, appellees argue (page 34) that no conflict can possibly result because NLRB jurisdiction was denied to appellees in the instant case. However, as was pointed out in the appellants' brief (page 40) this argument does not satisfy the situation, since the construction of the LMRDA advocated by the appellees would extend as well to non-supervisory employees of unions and thus give rise to the dual jurisdiction problem.

Appellees' principal argument against the position of the appellants is based upon the decision in the *Smith* case (page 34). However, the decision in the case does not dispose of the problem raised by the appellants. In that case, the Supreme Court held that the authority of the National Labor Relations Board to deal with an unfair labor practice which also violates a collective bargaining contract does not destroy the jurisdiction of the courts in suits under Section 301. In short, where the plaintiff admittedly has two remedies, one an unfair labor practice complaint before the Board and another a suit under Section 301 for breach of contract he does not have to utilize the remedy before the Board. The problem raised by appellants is entirely different. It is the question of whether or not Congress intended

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2. Appellees' statement that the appellants in making this argument are "strongly urging that they themselves were guilty of unfair labor practices" (Appellees' Br. 33-34), constitutes an inaccurate characterization of the appellants' position. Nor does the argument that "appellants are forced to march under the drab banner of administrative procedure" help the Court in its consideration of this problem.

to extend the LMRDA to cover the relationships between a union as an employer and its employees when such relationships are already adequately covered by the National Labor Relations Act. The *Smith* case has no bearing on this problem.

Appellants also pointed out in their brief (page 43) that the acceptance of the appellees' argument in this case has the effect of giving job protection to supervisory employees of unions where Congress, as a matter of policy, has specifically excluded job protection for such class of employees in the National Labor Relations Act and that this fact also militates against the appellees' position. The brief of the appellees does not attempt to answer this contention of appellants.

B. Jurisdiction of the District Court Over Counts 4, 5 and 6 of the Complaint.

The brief of the appellants (pages 44 and 45) argues that the jurisdiction of the District Court over Counts 4, 5 and 6 of the amended complaint, which are based upon a theory of pendent jurisdiction, depends entirely upon this Court's decision with repect to the Federal jurisdiction over Counts 1, 2 and 3. Appellees' brief does not disagree with this position.

C. The District Court's Failure to Dismiss the Complaint Insofar as It Relates to the Period Beyond December 31, 1961, or to Grant Summary Judgment to Appellants Thereon.

Appellants argue in their brief (pages 46-49) that assuming *arguendo* that the District Court was correct in its construction of the statute and its consequent jurisdiction over the subject-matter of the complaint, the Court should have dismissed the complaint insofar as it asserted the claim for relief based on job rights beyond December 31, 1961, or granted the appellants summary judgment with respect to such portion of the complaint. This position was

based upon the contention that the provisions of the IAM Constitution with respect to the jobs held by the appellees in the union as well as their job credentials clearly showed that each appellee held his job as Grand Lodge Representative only for a term expiring on December 31, 1961, and that reappointment was required beyond that date.

In answer to this argument, appellees criticize appellants for their reference to the card held by each appellee as a "credential" and for describing it as an "authorization". Appellees contend that the position of the appellants runs counter to the appellees' affidavits as well as reality and that the cards are simply for identification (Appellee's Br. 36). Appellees' argument simply ignores the fact that the document involved, placed in the record by appellees (R. 35, 36), shows on its face that it is a "credential" and that it "authorizes" the holder to represent the Grand Lodge of the IAM with respect to certain matters (R. 35, 36). The further argument based upon appellees' affidavits is without merit since the cited portions of the affidavits are simply legal conclusions. The undisputed facts before the District Court are the provisions of the IAM Constitution which give the President of the IAM authority to appoint Grand Lodge Representatives for any term that he designates and the job "credential" held by each employee which specifically states that he is "duly authorized" to represent the IAM with respect to certain matters for a period from January 1, 1960, to January 1, 1961. It is submitted that on these undisputed facts the District Court should have granted appellants summary judgment on all claims of the complaint extending beyond December 31, 1961.[3]

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3. Appellees' assertion that the appellants' argument amounts to advocating a "yellow dog" contract since it would require union employees as a condition of employment to forego union membership rights (Appellees' Br. 37) is another in the long list of irrelevant characterizations found in the appellees' brief.

Appellees' brief (pages 38 and 39) also quotes from the decision of the Fifth Circuit in *NLRB v. Hill & Hill Truck Line* in opposition to the appellants on this particular point. In doing so, appellees omit from their quote the following finding of the Fifth Circuit which appeared in the middle thereof: (page 887)

> "Moreover, as far as the record shows, these men were *regular* employees. They were therefore entitled to reinstatement to the jobs they had when they were illegally laid off. Respondent admits it needed them on the work day next following the lay-off."

In addition, the portion of the cited decision that is quoted by appellees is not applicable to the argument advanced by appellants. It could be applicable if appellants were here contending that appellees could not claim damages for the action of the IAM for the period between July 31, 1961, and December 31, 1961. However, appellants make no such contention. It is their position that, upon the undisputed facts of record, the appointment of appellees was for one year only and that it automatically expired on December 31, 1961, in accordance with the terms of the appointment. Thus, this is not a situation as in the *Hill* case where there was a mere contingency which the IAM's action prevented from being resolved and which is now only a subject for speculation. Regardless of the validity of the IAM's action of July 31, 1961, and wholly apart from that action, appellees' term of office expired on December 31, 1961, and they have no claim based on any period beyond that date. Appellants are not urging the Court, as appellees contend, to speculate in their favor but only to determine upon the basis of the IAM Constitution and appellees' credentials of appointment that appellees held a job which automatically terminated on December 31, 1961.

The brief of appellees (page 38) argues that even if the appellants are correct in their construction of the appellees'

appointment, they are not limited in assertion of damages to the period when such appointments expired. They cite in support of this proposition *Berkshire Knitting Mills v. NLRB,* 139 F.2d 134. It is submitted that this case had no application to the present situation. At pages 141 and 142 of that decision the Third Circuit considered the argument that the company should not have to pay full back wages to the employees involved during all the years that the litigation had been pending. The Court pointed out that Section 10(c) of the National Labor Relations Act gave discretion to the Board in the award of back pay, "not for the actual benefit of the employee concerned, but as a matter of public concern in the effectuation of the Act. It is a public right, not a private claim, which is enforced." Here, of course, the appellees seek to enforce a private claim and there is no statutory provision similar to Section 10(e) cited in the *Berkshire Knitting Mills* case to permit a claim for damages beyond those based upon their contract of employment.

It should also be observed the appellees assert a right to punitive damages even if it is held that their appointments automatically expired at the end of 1961 (Appellees' Br. 39). However, it is well settled that no punitive damages will be allowed for a breach of contract nor even in the case of a tort "except perhaps where the complaint sets out circumstances of extreme aggravation." *Minick v. Associates Inv. Co.,* 110 F.2d 267 (D.C. Cir., 1940). Certainly, depriving the appellees of employment for a brief period during 1961 does not constitute such extreme aggravation.

CONCLUSION

Upon the basis of the foregoing points and authorities, as well as those cited in the original brief, appellants pray that this Court reverse the judgment of the District Court.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John Victor Tilly

Nos. 18,543 and 18,544

United States Court of Appeals

For the Ninth Circuit

A. J. MYERS, *Appellant,* vs. UNITED STATES OF AMERICA and McLAUGHLIN, INC., a corporation, *Appellees.*	No. 18,543
WALTER JAMES WEAVER, et ux., *Appellants,* vs. UNITED STATES OF AMERICA and McLAUGHLIN, INC., a corporation, *Appellees.*	No. 18,544 (CONSOLIDATED CASES)

BRIEF OF APPELLANTS

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Nos. 18,543 and 18,544

United States Court of Appeals

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BRIEF OF APPELLANTS

JURISDICTION AND PLEADINGS

Jurisdiction in the District Court was based upon the United States Tort Claims Act relying upon Section 2674 of Title 28, liability of United States, insofar as the action was pending against the United States of America, doing business in Alaska as Bureau of Public Roads; and against McLaughlin, Inc., a corporation, alleging the sum above $10,000; diversity of citizenship was also alleged and proven. The A. J. Myers case was filed in the United States Dis-

trict Court in Anchorage on 10-22-59 and the consolidated case of Walter James Weaver was filed under the same law and practically the same set of circumstances and was filed on 11-27-59 in the United States District Court at Anchorage, and the two cases have been treated as one: In the arguments before the District Court; they were pre-tried together and the cases were consolidated and tried together.

The jurisdiction of the Court of Appeals rests on Section 1291 of the Federal Jurisdictional Code, Title 28, USCA and the Federal Rules of Civil Procedure. The jurisdiction of the United States District Court has never been put in question. The first and second amended complaints are very long and are set out in the Court Clerk's Transcript. In the Myers case, the original complaint is shown on page 1 of the Court Clerk's Transcript down to and including page 6 and for brevity sake is made a part of this brief by reference. The first amended complaint in the Myers case is shown verbatim in the Court Clerk's Transcript, page 12 to page 17 inclusive. And the second amended complaint in the Myers case is shown in the Court Clerk's Transcript, page 119 to page 125.

The second amended complaint in the Weaver case is found in the Court Clerk's Transcript at page 126 and extending down to and including 133. These are the amended pleadings on which the cases were tried. To these cases the defendants filed in the Myers case an answer on November 22, 1961, which is voluminous and found in the Court Clerk's Transcript commencing on page 134 and extending down to page 137, and

the defendants' answer to the second amended complaint in the Weaver case is found commencing on page 138 of the Court Clerk's Transcript and extending down to page 140. The pre-trial order signed by the Honorable Walter H. Hodge, United States District Judge at Anchorage, 15th day of June, 1962, is found commencing on page 175 and extending down to and including page 182, Court Clerk's Transcript. If we would endeavor to cite these documents, our brief would go far beyond that allowed in this court, and, therefore, we will very briefly state the contentions of the plaintiff: in both cases they filed on their homesteads, lived there the necessary time, after their proof was in they received patents from the Government, and in each of their patents there was a reservation for a road. There was a road across each of the properties or at least a trail prior to 1953, the date each of the parties filed on their respective homesteads. Then thereafter and in 1956, the evidence shows the United States Government acting by and through the Alaska Road Commission, was constantly working and gravelling this road and had taken care of it as it was part of the highway system of Alaska. Then later and in 1959, McLaughlin, contractor, carrying out a written contract with the United States, acting by and through the Bureau of Public Roads, commenced a new highway and attempted to take the old road and in addition thereto, a second highway across the plaintiffs' properties. The plaintiffs contend that the Government had established and selected its right-of-way as provided in the patent and that with-

out definitely stating the width that the part taken was 33 feet wide on each side of the middle line of the highway, or 66 feet. And the evidence will show that the Government at that time contended or later contended that by Order No. 2665 a greater amount of right-of-way was taken and this executive order was introduced in evidence and is quoted from at length by the Honorable Raymond E. Plummer, Trial Judge, who tried the case (Court Clerk's Transcript, pages 224 to 242). This particular order is quoted from at length as being the controlling law by the Honorable Trial Judge commencing in Footnote No. 1, page 236 of the Judge's Opinion and extending on down to page 238. That caused the plaintiffs to more or less adopt that part of the order which is found in the Judge's Opinion of the Court Clerk's Transcript which reads:

> "ALL LOCAL ROADS: All public roads not classified as through roads or feeder roads should extend 50 feet on each side of the center line thereof."

Apparently both sides in the trial of these cases relied upon that order. This accounts for the difference in the testimony of the amount of gravel taken from the plaintiffs' properties, since one set of figures computes the gravel taken beyond the area of 33 feet from the middle line of the highway, and the other set is based upon a computation of the gravel taken outside of and beyond the 100 foot right-of-way, 50 feet of which is allowed to each side of the middle of the highway, but in no place is there a contention that

the large gravel pit dug on the Plaintiff Myers' property was within either of the right-of-way contentions, and it extended almost 200 feet north of the middle line of the highway. This is so in many other places, and our contention is that the Court erred in not allowing each plaintiff to recover on the proof.

STATEMENT OF POINTS RELIED UPON AS FILED

Come now the appellants and each separately and individually rely upon the following statements of points in which they contend there is error in the Decision, the Findings of Fact, the Conclusions of Law, and the Judgment.

1. Each of the Findings of Fact, especially the following: That in Finding of Fact II wherein the trial court found that the plaintiffs in each of the cases filed on the land that is involved herein with full knowledge of the reservation created by 48 USCA 321d; that said 321d has been repealed by Congress due to the action of the appellate courts affecting it and that this repealed statute has no effect in this case since it was repealed before this lawsuit was tried or even commenced.

2. We except also to Finding of Fact III that it is contrary to law and contrary to equity.

3. We especially object and except to Finding of Fact IV and the whole thereof.

4. We object and except to Finding of Fact V because it is against the evidence and against equity and law in this case.

5. We except to Finding of Fact VI as it is contrary to the evidence, and is contrary to law and to equity.

6. We except to Finding of Fact VII and the whole thereof.

7. We except to Finding of Fact VIII and the whole thereof.

8. We except and object to Conclusion of Law No. 2 that such conclusion of law is contrary to the law involved in the case and is contrary to equity and justice.

9. We except to Conclusion of Law No. 3 for the reason it is contrary to the law of this case and contrary to all equity affecting this lawsuit.

10. We except to Conclusion of Law No. 4 for the reason it is specifically contrary to the evidence in the case and is contrary to law and to equity.

11. We except and object to Conclusion of Law No. 5 as being contrary to the evidence in the case, contrary to the law and contrary to the equity of said case.

12. We especially object and except to the Judgment rendered in this action on the 28th day of December, 1962.

ARGUMENT

For the sake of brevity in this case, we are grouping our Statement of Points under heading Number 1 extending to Number 12, as each and everything stated in this brief affects each of the Statement of Points. In the first instance, there seems to be no question as to the jurisdiction of the United States District Court who tried the case, or at least, appellants raise none in this court, but will proceed with the brief on the theory that the Honorable Raymond E. Plummer had jurisdiction of the subject matter and of the parties, and our contention is that he erred in applying the law to the facts before him.

Title 28, Sections 2672, 2673, and 2674 all provide that, quoting Sec. 2674 as follows:

> "The United States shall be liable respecting the provisions of this title relating to Tort Claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

We cited to the lower court and wish to cite now in support of our position the case of *Indian Towing Company v. United States,* 76 S. Ct. 122, 350 U.S. 61. This case specifically states that the court is not a self constituted guardian of the Treasury and that nothing should be read into the statute that is not there, and this case is in point with the case here.

The *Alaska Transport Association v. United States,* 221 F.2d 467, is also in point on the liability question. And on page 470 we wish to quote a small portion thereof:

> "There is no merit to this argument. No distinction is to be drawn between sovereign and proprietary functions in determining liability under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 et seq. Somerset Sea Food Co. v. United States, 4 Cir., 193 F.2d 631; Mid-Central Fish Co. v. United States, D.C.W.D.Mo., 112 F.Supp. 792 at page 795; Cerri v. United States, D.C.N.D.Cal., 80 F.Supp. 831."

We then cite *United States v. Yellow Cab Co.,* 340 U.S. 543. This case seems to be the leading case in this matter and reversed 183 F.2d 825 and affirmed the decision in 181 F.2d 967.

Panella v. United States, 216 F.2d 622, is good in that it holds that the language in Section 1346 should give full scope to the government's relinquishment of its historic immunity from suit and on the other hand, avoid narrowing the provisions which set forth situations in which Congress has seen fit to retain that immunity.

United States v. Holcombe, 277 F.2d 143, defines Federal Agencies and under this definition the Alaska Road Commission is squarely in the middle of the description.

Howey et al. v. Yellow Cab Co. and United States, 181 F.2d 967, was affirmed by the United States Supreme Court in the *Yellow Cab* case above cited, which was 340 U.S. p. 543, and with the action of the United States Supreme Court this *Howey* case is important in our cases here.

It should be noted that the Trial Judge was persuaded a great deal by Title 48, Section 321d found on page 180 USCA and while it was admitted in the trial of the case that this section of the statute was repealed a long time before our case was tried, yet it seemed very persuasive on the Trial Judge and caused him to think in terms far beyond the reservation set forth in the patent issued to each of these parties. The Cumulative Pocket for 1960 on page 45 states clearly that the section has been repealed and 181 F.Supp. at 219, which opinion was upheld in 352 P.2d 633 on holding this section 321d was repealed a long time before we tried this case.

STATEMENT OF THE CASE

These two actions were filed in the United States District Court for the District of Alaska at Anchorage. The first bearing Number A-16,481 Civil, and the last mentioned case Number A-16,632 Civil. These two cases, after the issues were joined, were consolidated for trial by an order of the United States District Court here.

The plaintiffs in both cases were represented by the same attorneys, Bell, Sanders and Tallman. The defendants were represented by Weyman I. Lundquist, Esq., representing the United States, David H. Thorsness, Esq., representing the defendant McLaughlin, Inc., a corporation.

After the case was tried, the trial judge, Honorable Raymond E. Plummer, took the case under ad-

visement and later rendered a memorandum opinion denying each plaintiff any recovery. See 224 Clerk's Transcript.

The evidence shows that A. J. Myers filed on his homestead in the spring of 1953.

The record shows that Walter James Weaver filed on the other land in the spring of 1953.

Each of these parties went upon their homesteads and made improvements and complied with the Homestead Law, and on the 21st day of March, 1954, a patent was issued to A. J. Myers, and on the 16th day of July, 1956, a patent was issued to Walter James Weaver.

The evidence shows that this road in question was first constructed on or about 1949, being a trail prior thereto, having been used in that vicinity for several years previously.

From time to time this road was worked by the Highway Department of the Territory of Alaska, known as Alaska Road Commission; it was widened and gravelled in 1949, and in the spring of 1956, there was a well established highway which ranged in width from sixteen (16) feet to thirty-three (33) feet. Then in 1959, at the time the Government acting with McLaughlin, Inc., began reconstructing the highway that, all of the damage alleged by either plaintiff took place, and was perpetrated in 1959.

There were many items of damages suffered that there was no dispute over. The whole case, as you

will observe by Judge Plummer's Opinion (Clerk's Transcript 224 to 242) centered on the theory that the Government by its act in issuing the patents to these two plaintiffs reserved a right of way for a roadway 300 feet wide or even more. Assuming that the dates used in the opinion of the Honorable Raymond E. Plummer above-mentioned are correct, it was established unquestionably that the road was a graded gravel road in 1949, taken care of and maintained by a department of the Territory of Alaska, maintained by the United States of America, which department was known as the Alaska Road Commission which was a predecessor of the Bureau of Public Roads. (See Opinion page 230 of Court Clerk's Transcript.) And this road was constructed, and became a part of the highway system before either of the plaintiffs in this case had filed on the land. And in 1949, it was widened and gravelled and at that time was regularly maintained by the Highway Department. Then this continued in that condition until 1959 when the United States acting through the Bureau of Public Roads made a contract with the other defendant McLaughlin to re-grade and widen this road and the testimony shows that on one side of the roadway through the Myers place, a large gravel pit was made, and thousands of yards of gravel taken, which pit extended about 200 feet from the middle lines of the highway there and for more than fifty feet from the middle line in all places and as a result, thousands of yards of gravel were taken from the land belonging to each of the plaintiffs without

any consent whatsoever, and over the protest of the plaintiffs. No payment or compensation of any kind was tendered by the contractor or the Government.

Plaintiffs contend in the first instance that all the Government had there was a sixty-six foot right-of-way which extended thirty-three feet each way from the middle of the established road. During the trial of the case there was introduced proof showing that the Government had made an Executive Order taking fifty feet on each side of the middle of the roadway. This is covered by Order 2665 *Right-of-Way For Highways In Alaska,* pages 236, 237 and 238 of Court Clerk's Transcript, Footnote No. 1 (a part of the Honorable Trial Judge's opinion). You will note on page 237, after the main highways in Alaska are described, in which this particular road is omitted, that Paragraph 3 is the portion of the Executive Order that applies to the road in question, which reads as follows:

> "FOR LOCAL ROADS: ALL PUBLIC ROADS NOT CLASSIFIED AS THROUGH ROADS OR FEEDER ROADS SHALL EXTEND 50 FEET ON EACH SIDE OF THE CENTER LINE THEREOF."

This order was put into effect October 16, 1951 (Court Clerk's Transcript 237). This order was then amended on July 17, 1952, in a matter not pertinent to these cases and then this order No. 2665, Department of Interior, was amended September 15, 1956, several years after these plaintiffs had filed on these properties and were authorized by the United States

Land Department to enter, and at that time their improvements were all there and patents had been issued to each of the plaintiffs.

The opinion of the Honorable Raymond E. Plummer gives the date of entry of both plaintiffs upon the lands in question during the year of 1953, and a patent was issued Alva J. Myers, March 21, 1954, and a patent was issued Walter James Weaver, July 16, 1956.

The principal question decided by the Honorable Trial Judge was whether or not the order abovementioned controlled, that is the order that reserved a right-of-way on this road fifty feet in width on each side of the middle line or whether some other rights were vested in the United States of America not mentioned in his opinion.

Our contention being that all taking of gravel on the plaintiffs' land beyond the fifty foot on each side of the middle line was a trespass and all chattel property taken and all damage done was within the rights of the plaintiffs to be compensated therefor. That the trial judge was in error in denying the plaintiffs any recovery and that the case should be reversed with instructions to allow the plaintiffs to recover a sum of money commensurate with the proof in the cases.

Plaintiff Myers testified that the defendants took seventy-six (76) feet from the middle line of the roadway on the south side thereof, by one thousand (1,000) feet in length and a little over seven (7) feet

deep (Tr. 34). This was gravel with trees on it. He further testified that they took land on each side beyond the right-of-way up the hill (Tr 35), that they took an additional one hundred (100) feet near the west end beyond the thirty-three foot right-of-way and about one thousand feet in length (Tr 37, 38, 39).

Then he testified that there was a large burrow pit on the north side where 16,707 cubic yards of gravel were taken and another one from station 205 + 40 to 208 + 64 where 711.3 cubic yards were taken. This by measurement.

Then on the south side of station 192 + 80 to 199 + 62, 2,303.2 cubic yards; and at station 181 + 75 to 183, 382.4 cubic yards were taken, and from station 203 + 65 to station 208 + 64, 5,167 cubic yards, (Tr 38 and 39) all totalling 26,000 cubic yards.

He qualified as an engineer and testified to years of experience as an engineer (Tr 40, 41, 42, 43 and 44).

It was stipulated on Tr 21 as follows:

> Mr. Lundquist. We will agree that they were so employed and that they did the work down there as I indicated in 59."

It was agreed on Tr 19 that this property was a highway and a public road and maintained as such when these plaintiffs moved on their respective homesteads.

Near the close of the case there were further proceedings commencing on page 533, Tr, the plaintiffs asked to re-open in chief since the document showing

50 feet on each side of the middle line of the highway was reserved as a right-of-way and the plaintiff had relied upon 33 feet on each side and giving the defendants the benefit of the doubt, the plaintiff recalculated the amount of gravel taken from his premises outside of the 50 foot right-of-way on each side, so that the judge had before him for determination, both the amount of gravel converted to the defendants' use, if the Court held that a 66 foot right-of-way was all that the defendants had, or if he should uphold the order No. 2665, as amended September 15, 1956, Clerk's Transcript, 237, 238, by making the right-of-way 100 feet instead of 66 feet, then we would have accurate gravel conversion to fit either position, and to clarify this we wish to quote a part of the record from page 553 down to and including 577.

Tr 553

> Mr. Bell. I will ask to reopen in chief just to get those figures before you, because it is pleaded in the case. They are in the original complaint, and this change from fifty feet on each side, to thirty-three feet was made after the original complaint was filed, and changed because we thought we were right on it. As I understand a highway is normally sixty-six feet. We thought that thirty-three feet on each side was correct and we amended our complaint to ask the court for an additional amount accordingly.
>
> Mr. Thorsness. May I inquire, Your Honor, or perhaps of the witness, as to whether or not the notes of Mr. Myers in evidence were taken with regard to a fifty foot right of way on each side or a thirty-three foot?

Tr 554

A. They were taken so they could easily be separated if I was called upon for a fifty foot or thirty-three foot from center. * * *

Tr 555

The Court. What did you do originally? What did you do to arrive at the amount of gravel you allege was removed in the original complaint. Will you tell us what you did and how you arrived at that?

A. There is no change.

The Court. Tell us what you did.

A. Cross sectioned the hole that the gravel was taken out of. In a way that isn't the right word. There is no change in the large hole. *It was all beyond, even where it starts down (Tr 556) it was all beyond the fifty foot line. 76 feet, 72 feet, every bit was beyond, so there was no change in that hole at all.*

The Court. I would like to hear what you did before we get to the notes. Tell us exactly what you did.

A. Cross sectioned like any engineer would, and computed the same with the cross section notes, a standard method.

Mr. Lundquist. Did you compute all those notes in those field notes previously offered in evidence?

A. Yes. They've never been changed.

Mr. Lundquist. I now think we have anough to see what he computed.

By Mr. Bell:

Q. Mr. Myers, will you show the court the amount actually taken from the hole or big pit, as you call it, on the north side of the road?

A. I didn't understand that question.

Q. How much gravel was taken out of the first big pit on the north side of the road that you calculated?

A. 16,707.5 cubic yards.

Q. Was that all taken outside of the fifty foot right of way?

A. Yes.

Q. Now, then, would you show the court on the opposite side of the highway.

A. I cross sectioned in the same manner, but cross (Tr 557) sectioned it there beginning at the thirty-three foot line and taking shots at the fifty foot line all the way down on the stations. Therefore what I do to get the correct yardage from the fifty foot line is recompute that little bit of notes and I would get what it amounted to. I did compute them at one time. It was about two thousand yards instead of five thousand or something——

Q. As I understand it, when you computed and starting from the fifty foot line, there would be how many yards taken.

A. I would have to quote that from memory, 18,700 and something.

The Court. I will deny the motion.

Mr. Lundquist. There is one thing I am bothered about—I am not bothered about the motion being denied which I think is quite within your prerogative—but I don't see how the Court can now find sixty-six feet because they have changed their claim as a matter of record to 100 feet. Other than addressed to the two quantities I do want his testimony in and all that. With that in mind I will withdraw my motion and the Court can evaluate the evidence. *It is my under-*

standing that it is 100 foot and there is no such thing as a sixty-six foot claim?

Mr. Weaver testified that he moved on his homestead in 1953. He received his patent in June of 1956. He started his buildings in 1953, built a four-room house with a bath, had a well drilled that cost him $720, built a double garage and a storage room, that the old highway as established went by his home less than 200 feet away, that the ground at his home was approximately 2 feet above the highway (Tr 228, 229). Pictures were then introduced (see Exhibit O). He testified that when they made the big cut in front of his place, that the roadway was 12 to 14 feet below his garage.

The old highway had long since been established with a surface of 18 to 20 feet wide, and the new highway, the one involved in this lawsuit, came following the old highway for a short distance. Took 200 feet in width of his property and then cut across his property and left the old highway and established a new road altogether. Took a strip of his land 200 feet wide and 2100 feet in length (Tr 236, 237).

He testified that the defendants took much gravel off of his land and used it further down the road beyond the boundaries of his property.

He testified to paying $240 for preparation of land for cultivation and then was deprived of the use of it (Tr 242).

Then he testified that the defendants piled a lot of rubbish on his property away from the highway and

that he had to hire it cleared off and it cost $140.00 (Tr 243). He testified that the defendants took the timber and top soil.

On Tr 93, the young engineer, Clarence Hirschbach, called as a witness, testified to a place on the north side of the highway 186 feet wide that he described as being 136 feet over and above the 33 feet that he used as one half of the original 66 foot right-of-way. When you subtract 33 feet from 186 feet you really get 153 feet, and this shows conclusively that if the Court followed the Executive Order taking 50 feet on each side of the highway, this would unquestionably be 136 feet over on Mr. Myers' property, beyond the right-of-way, even if we concede that the Order Number 2665, above referred to, controlled, instead of the 66 foot right-of-way that we started with. Under any circumstances, the best that can possibly be said for the defendants is that this Executive Order Number 2665, as amended, (see Trial Court Opinion, pages 236, 237 and 238, Clerk's Transcript) is controlling. Then, and in that event, the trial court erred in his decision.

Therefore, without a doubt, the trial court made an error in denying the plaintiffs any recovery, and many such instances are in the record, and if there is an error made in the trial, it ought to be referred back and re-tried to do justice by the parties. There is evidence all of the way through of going over 200 feet from the highway and digging large gravel pits, taking thousands of yards of gravel from the land of each of these plaintiffs. And the trial court just

brushed aside all of that and gave the plaintiffs nothing, which we contend is a very prejudicial error, defeating justice.

Now on the Weaver property, the evidence unquestionably shows that there was a highway built across his property and used for many years and this highway was only followed by the new highway a very short distance and then a new right-of-way taken. However, the old highway is retained and this new highway went more than a quarter of a mile across the Weaver property and destroyed more than 200 feet in width. This is not denied anywhere in the evidence, and all exhibits and documents show that it is true. The question as we view it is whether or not a reservation for a highway in a patent or deed, without definitely locating it, is simply a floating reservation until it is definitely selected and fastened down to one place, and once it is definitely settled down and used, that is all that the reservation covers and any additional taking of land would have to be by, either the consent of the owner or condemnation, either with the consent of the owner or by condemnation, and since the Alaskan laws are and were at that time so definite and certain that no contract or oral agreement could in any way affect rights in real estate, 58-2-2 ACLA 1949, and there is not a contention in the record that either of these men ever signed a document giving any right-of-way across their land and the only right-of-way that the defendants had, was the right-of-way reserved in the patents and that having been taken and used for several years became

definitely fastened down *and the reservation had been met and this new taking was wrongful.*

The evidence is clear that the contractor turned off the regular highway and took a strip across Weaver's place of 200 feet wide and 2100 feet long (Tr 245, 246). Weaver testified that they destroyed his road leading from the old highway to the back field and he could not get in with his motor-driven vehicles (Tr 247). That he cannot get into his cleared off land by reason of conditions created by the defendants (Tr 248, 249).

He testified that he had to abandon his home because he could not live there in the winter time, due to destroying his driveway and ingress and egress. That the original roadway took up 18 to 20 feet of a 66 foot right-of-way, that which covered generally all the right-of-way as far as he knows. That he moved away from his homestead on the 17th day of November, 1961 (Tr 270).

He also testified that the Contractor McLaughlin, a defendant, dug a lot of holes with a bulldozer testing the gravel, that they filled part of those holes, but left four unfilled which made big scars on the land and were 400 or 500 feet from the roadway.

Mr. Myers was recalled as a witness and testified that there was an old road on the back of the Weaver property that had formerly crossed the highway and was accessible, that the old highway road went through his place and on into the Weaver property and across it.

That the new highway went across Weaver's property from the place it left the old road, which took up 66 feet on one side of the middle line and 132 on the other side. That the timber in this area was destroyed (Tr 340, 341). That outside of the 33 foot line from the middle of the pavement at one place, the contractor took 1769.3 cubic yards. At another place, the contractor took 6233 cubic yards of gravel. Part of this came in a strip between the 33 foot line from the middle of the pavement up to 172 feet, making 139 feet, and if the document 2665, as amended, is correct, then we would have 122 feet in width, hundreds of feet in length, and 4 feet in depth of gravel that the contractor took while he was following the old road; then when he went off on a completely new road, he took 2100 feet long and 200 feet wide, and in so doing, he took out 1769.3 cubic yards, plus 6233 cubic yards, of gravel that the Government had no right to take at all, as they did not follow the established highway, but took out across his place without the slightest right as the old highway had been established for several years and had been worked and maintained by the Road Commission (Tr 341, 342 and 343).

It is our contention that: This highway being established across both plaintiffs' land, which was accomplished in 1949, and held and worked and treated as a highway from then until 1959; that it was a taking and establishing of a highway, and when this Executive Order came out, it defined the limitations to 50 feet on each side of the middle line and the act of the defendants in taking gravel from the properties of the

plaintiffs outside and beyond the 50 feet on each side of the middle line was conversion.

The law of Alaska has been settled by the case of *Hillstrand v. State of Alaska,* consolidated with *John C. Zak, plaintiff, vs. United States of America.*

The *Zak* case, affecting this same road, was appealed to the Supreme Court of Alaska, which court refused to change the Judge McCarrey opinion and it is and was at all times the law of Alaska during the trial of these cases. We will now quote from this above mentioned case, 181 Federal Supp., page 220 over to 221.

> "Defendant State of Alaska, purporting to act under the authority of Act of Congress of July 24, 1947, 61 Stat. 418; 48 U.S.C.A. § 321d; § 41-1-4 A.C.L.A. 1949, proposes to enter upon plaintiff Hillstrand's land and thereon relocate a certain highway, known as the Sterling Highway, and in so doing contends that it needs only to compensate the owner of the property for 'the value of crops and for adjustment of improvements located on the right-of-way area.' See letter dated June 1, 1958 from E. H. Swick, Regional Engineer, to Earl A. Hillstrand. Purporting to act under the same authority, the State of Alaska, in improving the 'Big Lake-Wasilla Road', has entered upon plaintiff Zak's land and 'widened and improved the roadway, including necessary cutting and filling for the roadbed,' see Memorandum of Facts submitted by the Attorney General Dec. 3, 1959, and in so doing has allegedly dug and removed earth from Zak's property to his damage. In both suits the plaintiffs pray for dam-

ages for the injury already done, and in No. A 16,205 as the relocation is not yet completed, the plaintiff asks for an order restraining the State from proceeding further with the work already commenced until such time as appropriate condemnation proceedings, as provided for in Section 57-7-1 et seq., A.C.L.A. 1949, are instituted.

The following excerpts from a letter to the Speaker of the House of Representatives from Oscar Chapman, Acting Secretary of the Interior, dated January 13, 1947, and included in the 'Explanation of The Bill,' printed in U.S. Code Cong. Serv., 1st Session (1947) pp. 1352, 1353, set out clearly what the intent of Congress in enacting 48 U.S.C.A. § 321d was:

> 'The purpose of the enclosed draft is to provide for the reservation by the United States in patents or deeds to land in Alaska of rights-of-way for trails, roads, highways, tramways, bridges, and appurtenant structures constructed or to be constructed by the authority of the United States or of any future State created in Alaska. Such legislation is desirable to facilitate the work of the Alaska Public Road Commission.'
>
> 'The greater part of the area on which the operations of the Alaska Road Commission are conducted is public domain land outside of national forests, and the location of rights-of-way on such land presents no serious problem. However, for the proper location of roads and in the interest of public service, it is necessary in some instances to cross lands to which title has passed from the United States. These instances are becoming more numerous as the

> population of the Territory increases, and obtaining rights-of-way over such lands has in a number of cases presented difficulties requiring court action and expenditure of Federal funds.'
>
> 'The proposed legislation is similar to the provision of the act of August 30, 1890 (26 Stat. 391, 43 U.S.C. sec. 945), which reserves rights-of-way for ditches and canals constructed by the authority of the United States, west of the one hundredth meridian. A similar provision is also found in the act of March 12, 1914 (38 Stat. 305, 48 U.S.C. sec. 305), by which rights-of-way for railroads were reserved to the United States in all patents for lands thereafter taken up in the Territory of Alaska. The proposed bill would be applicable to both public domain and acquired lands of the United States. The proposed bill, moreover, would authorize the head of the agency utilizing such reserved right-of-way to make payment for the full value of the crops and improvements thereon.'

It is clear that Congress, in 1947, was concerned that the same persons who were acquiring land under the liberal provisions of the Homestead laws would be in a position to demand compensation from the Government if, at a later date, the Government should deem it necessary to use a portion of the same land for highway purposes. As the future position of highways over the public lands could not be predicated with any accuracy, Congress rather logically concluded that it would insert an appropriate reservation in every patent thereafter issued to Alaska homesteaders. The magnitude of their cloud which this bit of legislation placed upon titles to land in Alaska was appreciated, however by the 86th Congress and,

therefore, 48 U.S.C.A. § 321d was repealed in the Alaska Omnibus Act, 73 Stat. 141 (Sec. 21(d)(7)).

Defendant State of Alaska, in the instant case, argues that Ide v. United States, supra, is clear authority for its acts upon the Zak and Hillstrand properties. This at page 9 of the State's 'Further Memorandum of Points and Authorities in Support of Motion for Summary Judgment,' in the Hillstrand case file, the State argues, after quoting from the Ide opinion, 'it appears evident that if property can be utilized for a change of a ravine after the issuance of patent, under a similar reservation of a right-of-way, the State could make any needed changes in the width or route of a right-of-way crossing land subject to such a reservation.' *I am unable to agree with the State that the Ide case is authority for making more than one election under the statutory reservations.* Indeed, I find no case, nor has the State cited any, in which the Sovereign, after once exercising its right under any of the reservations found in the three Acts of Congress, has been permitted to avail itself a second time of such reservations.

[1] Finding no other helpful cases construing the Federal reservations, we must turn to the law of private easements. 'Blanket' or 'floating' easements are relatively common phenomena; however, their interpretation appears to have been controlled by that policy of the law which favors making all encumbrances affecting real property as specific and definite as possible so that the interests of the various owners or claimants of the land can be accurately ascertained.

Thus, in In re Oak Leaf Coal Company, D.C.Ala. 1915, 225 F. 126, 127, 129, involving a deed reserving to the grantor the right 'to build railroads through said land in order to reach other lands beyond and above,' the Court said:

> 'The right of way is not defined in the grant, but has been actually located on the ground, with the acquiescence of the respondent, and this as effectually serves to define the grant as would a description in the deed. The grant, so defined, ceases to be uncertain, and no use of the right of way, other than one that is reasonable and necessary to develop the lands covered by the reservation, would be permitted.'

This rule is fully supported by the law. See particularly Youngstown Steel Products Company of Cal. v. City of Los Angeles, 1952, 38 Cal.2d 407, (240 P.2d 977, 979, ('One the location of an easement has been finally established, whether by express terms of the grant or by use and acquiescence, *it cannot be substantially changed without the consent of both parties.* * * * And the grantor has no right either to hinder the grantee in his use of the way or to compel him to accept another location, even though a new location may be just as convenient.' 240 P.2d at page 979); Capital Electric Power Association v. Hinson, 1956, 226 Miss. 450, 84 So.2d 409, ('The general rule is that where the grant is in general terms, the exercise of the right, with the acquiescence of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed. * * *

This rule * * * applies to the course, manner, extent, and length.' 84 So.2d at page 413); Woods

Irrigation Company v. Klein, 1951, 105 Cal.App. 2d 266, 233 P.2d 48 ('Therefore, the ditches necessary * * * *once located, cannot be relocated. Any other rule would make the burden imposed by the easement a matter of perpetual speculation and subject the servient owners to continual uncertainty as to their rights to the use and enjoyment of their land.*' 233 P.2d at page 50).

[2] While I agree that the original reservation and election provided for in 48 U.S.C.A. § 321d is without limitation as to initial choice on the part of either the Federal Government or the State of Alaska, I find that, once the right-of-way has been selected and defined, later improvements, necessitating the utilization of land upon which the road is not already located, can only be accomplished pursuant to the condemnation and compensation provisions of Section 57-7-1, et seq. A.C.L.A. 1949.

As Ide v. United States, supra, 263 U.S. at 502, 44 S.Ct. at page 183, makes clear that the wording of the 1890 statute covered rights-of-way already established at the time of its passage, I so find as to the 1947 statute, and, therefore, in the light of what already has been set out supra, I hereby deny the State's motion for summary judgment in No. A-16,205 for the reason that the State's predecessor, the United States, had already established a road across what is now the Hillstrand property at the time the 1947 reservation was authorized.

Turning to the Zak case, the file discloses that the Big-Lake-Wasilla Road was constructed in 1949, at which time the land over which it ran was still part of the public domain. See 'Memo-

randum of Fact', filed by the Attorney General in case file No. A-16,247, December 3, 1959. Interpreting the construction at that time as constituting the single election to which the State is entitled, I find that, once Zak had filed his Homestead application any changes by the State to the right-of-way already selected and defined would likewise have to be condemned and compensated for under the provisions of 57-7-1 et seq. A.C.L.A. 1949. Therefore, I hereby deny the motion for summary judgment on the part of the State of Alaska in case No. A-16,247."

CONCLUSION

First, we contend that the selection was complete before 1959.

Second, the right of way was limited to 50 feet on each side of the middle of the highway.

Third, a large part of the gravel was taken and the damages done outside of the 50 feet from the middle line or the right of way.

Fourth, the destruction of the subdivision was all beyond the 50 feet north of the middle line of the highway.

Fifth, the evidence clearly establishes that many thousands of yards of gravel were taken from the large gravel pit clearly outside of any right of way.

Sixth, that the defendants went across the Weaver property, by leaving the old regular established highway, creating a "Y" and taking undisturbed land 200

feet wide and 2100 feet long, moving and using gravel from his land to other places on down the road.

Seventh, the defendants dug holes four or five hundred feet from either highway in Weaver's property and failed to fill them up.

Eighth, many other allegations of damages were proven and in some instances never denied.

We request the above named court to render the judgment that the trial court should have rendered or reverse and remand for a new trial.

Dated, Anchorage, Alaska,
May 1, 1963.

Respectfully submitted,

James K. Tallman,
William H. Sanders,
Bailey E. Bell,
By Bailey E. Bell,
Attorneys for Appellants.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Bailey E. Bell,
Attorney for Appellants.

Nos. 18,543 and 18,544

United States Court of Appeals

For the Ninth Circuit

A. J. MYERS, *Appellant,* vs. UNITED STATES OF AMERICA and McLAUGHLIN, INC., a corporation, *Appellees.*	No. 18,543
WALTER JAMES WEAVER, et ux., *Appellants,* vs. UNITED STATES OF AMERICA and McLAUGHLIN, INC., a corporation, *Appellees.*	No. 18,544 (CONSOLIDATED CASES)

BRIEF FOR APPELLEES

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Nos. 18,543 and 18,544

United States Court of Appeals
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BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

Jurisdiction was conferred upon the United States District Court for the District of Alaska by the provisions of Section 1346(b), Title 28, United States Code, which allows suits to be brought in the District Courts where the United States is a defendant. In connection with the appellant, McLaughlin, Inc., jurisdiction was conferred on the District Court by

virtue of the provisions of Section 1332(a)(1), which provides that a District Court has jurisdiction in cases involving a diversity of citizenship and the amount in controversy is in excess of $10,000.00.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is provided for in the provisions of Section 1291, Title 28, United States Code.

The appellants' Second Amended Complaints (Record on Appeal, pages 119-125, 126-133) alleged that the basis of the District Court's jurisdiction was that the United States, acting by and through the Bureau of Public Roads, committed a trespass upon the appellants' land and was, therefore, cognizable under the Federal Tort Claims Act. The appellants (residents of Alaska) further alleged in their Second Amended Complaints that the appellee, McLaughlin, Inc., a Montana corporation doing business in Alaska, had also committed a trespass upon the appellants' real property.

Appellee, McLaughlin, Inc., by way of cross-claim alleged that appellee, United States, represented that it had a right to go upon the appellants' land and utilize the materials found thereon within certain boundaries for the construction of the roadway in question and that in the event judgment was rendered against McLaughlin, Inc., because of the alleged trespass it was entitled to be indemnified by the United States. (Record on Appeal, pages 71-75.)

STATEMENT OF THE CASE

A. Pleadings

Three complaints were filed by each appellant, the first two of each being dismissed for reasons not pertinent to this appeal. The Second Amended Complaints, upon which this case was tried, set forth certain allegations by the appellants, one of which stated the tort upon which the suit was founded; and the remaining allegations set forth the various claims of damage. The appellants claimed that the defendants, without authority, entered upon the appellants' land in connection with the performance of a contract between McLaughlin, Inc., and the Bureau of Public Roads for the grading and paving of a strip of highway running in a westerly direction from Wasilla to the Big Lake Junction. This roadway passed through and across the property of the appellants and the construction of the same was alleged to constitute a trespass upon the appellants' land, resulting in the following damages to appellant Myers:

1. A roadway into the appellant's field was ruined which prevented Myers from raising produce, thereby being damaged in the sum of $6,583.20.

2. Twenty-six thousand (26,000) yards of gravel were removed of a reasonable value of $26,000.00.

3. The surface of eight lots was damaged to the sum of $4,800.00.

4. The grade of a driveway into a little coffee shop and restaurant was changed, causing damage in the amount of $5,000.00.

5. Loss of timber and trees around the home, resulting in damage in amount of $5,000.00.

6. Parking of appellee, McLaughlin, Inc., equipment on the appellant's property for sixteen days, causing damage in the sum of $320.00.

7. The entrance to the coffee shop and restaurant was obstructed, causing a loss of profits in the amount of $300.00.

8. The destruction of a sign in front of the appellant's restaurant, causing $200.00 in damage.

9. Reduction in value in the appellant's property because of the taking and grading of the highway in the amount of $12,000.00. (Record on Appeal, pages 175-182.)

The Second Amended Complaint of appellant Weaver set forth a claim of trespass to the extent of 210 feet in excess of the right of way reserved in the appellant's patent of 66 feet. As items of damage, appellant Weaver claimed:

1. Damage to a cleared garden or agricultural tract in the amount of $4,140.00.

2. Damage to his driveway and home site and the taking of 13,337 yards of gravel for a total amount of $20,005.50.

3. The taking of 5,444 yards of gravel beyond the right of way for the amount of $8,151.00.

4. Destruction of the appellant's driveway, making it necessary for him to move his garage, house, and outbuildings, thereby being damaged in the amount of $10,000.

5. The taking of 8.5 acres and relocating the road across a portion of his land and removing gravel, damages in the amount of $25,000.00.

6. The tearing up and destroying of a roadway into the appellant's land, thereby damaging him in the amount of $5,000.00.

7. The moving, relocating, and rebuilding of appellant's residence at a cost of $10,000.00.

8. The abandonment of the construction of an asphalt plant as a result of a taking of a portion of the right of way, causing him damages in the amount of $25,000.00.

9. The bulldozing of holes on the appellant's property, causing damage in the amount of $750.00.

To the allegations of the appellants' Second Amended Complaints, the appellee, United States of America, denies any trespass, waste, or conversion of the appellants' property or damage to the same and set up as an affirmative defense the reservation of a right of way for roads and highways in the appellants' patents authorized under the authority of Section 321d, Title 48, United States Code. (Record on Appeal, pages 134-140.)

Appellee, McLaughlin, Inc., by way of defense, set forth the same affirmative defenses as the United States and, in addition, alleged that any acts performed by them on the appellants' property outside of the right of way, were done with the consent and acquiescence of the appellants. By way of cross-claim, the appellee, McLaughlin, Inc., prayed that should it

suffer a judgment as a result of the suit, it should be indemnified by the United States for such loss.

B. Facts

The appellant Myers received a patent to his land on March 21, 1954 (Exhibit "B", Transcript on Appeal, page 10), and appellant Weaver received his patent to the land in question on July 16, 1956, (Exhibit "L", Transcript on Appeal, page 114.)

At the time the appellants entered upon their land during 1953-1954 respectively (Transcript on Appeal, pages 11, 228), there existed a road across their land which was very narrow and not yet totally graveled, having been established in 1949. (Transcript on Appeal, page 12.)

Appellee, United States of America, entered into Contract DS-0510(5) with appellee, McLaughlin, Inc., for the construction of the Wasilla-Big Lake Junction Road. (Exhibits 3 and 4.) This new road crossed over the appellants' land, utilizing in part the existing road. The damages claimed by the appellants as a result of the method of construction are fully set forth in the appellants' brief and the pre-trial order. (Record on Appeal, pages 175-182.)

QUESTIONS INVOLVED

The appellants in their brief separately and individually contend that the trial Court erred in its Decision, the Findings of Fact, the Conclusions of Law, and the Judgment and set forth twelve specifications

to the above. It is the basic contention of the appellants that the trial Court erred as a matter of law in finding that Section 321d of Title 48, United States Code, created a reservation in the appellants' patent which gave the United States or any state created out of the territory of Alaska the right to construct a road or roadway across their property. The appellants urge that because the statute was repealed before the lawsuit was tried or commenced, it gave the United States no right to construct the Wasilla-Big Lake Junction Road across their property and that in doing so, the appellees' acts constituted trespass by which the appellants were damaged and, therefore, entitled to compensation. The appellants further contend that the appellee, McLaughlin, Inc., committed a further trespass by digging deep holes and depositing certain overburden on the appellants' land outside the right of way claimed by the United States.

SUMMARY OF ARGUMENT

It is the position of the appellees that the appellants' patents contained a reservation of right of way for the improvement of and or construction of roads or roadways, constructed or to be constructed, under the authority of the United States or any state created out of the Territory of Alaska by virtue of the provisions of Section 321d, Title 48, United States Code, and the implementing Executive Order with Amendments of the Department of Interior. The appellee, United States, takes the position that it was

entitled to a 300 foot right of way across the appellants' lands for the construction of the Wasilla-Big Lake Junction Road. The appellee United States further contends that any trespass outside of the 300 foot right of way by the appellee McLaughlin, Inc., was outside the scope of the contract for which the United States would not be liable.

The appellee McLaughlin, Inc., asserts that any of its conduct or acts outside of the right of way was with the permission and with the acquiescence of the appellants.

Finally, the appellees contend that the appellants have not made sufficient showing which would warrant reversal or remanding of the trial Court's decision or a finding that the trial Court erred in its Findings of Fact and Conclusions of Law by this Honorable Court of Appeals.

ARGUMENT

The patents issued to appellant Myers on March 21, 1954, and to Weaver on July 16, 1956, provided in part as follows:

> "Now Know Ye, That the United States of America, in consideration of the premises, Does Hereby Grant unto the said claimant and to the heirs of the said claimant the tract above described; To Have And To Hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to (1) any vested and accrued water rights for

mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; (2) the reservation of a right-of-way for ditches or canals constructed by the authority of the United States, in accordance with the act of August 30, 1890 26 Stat., 391, 43 U.S.C. sec. 945), and (3) the reservation of a right-of-way for roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or by any State created out of the Territory of Alaska, in accordance with the act of July 24, 1947 (61 Stat., 418, 48 U.S.C. sec. 321d). There is also reserved to the United States a right-of-way for the construction of railroads, telegraph and telephone lines, in accordance with section 1 of the act of March 12, 1914 (38 Stat., 305, 48 U.S.C. sec. 305)."

Section 3 of the patent which subjected the grant to the reservation of the right of way was based on Section 321d, Title 48, enacted in 1947 and repealed by Public Law 86-70, Section 21(d)(7), June 25, 1959, 73 Stat. 146, effective July 1, 1959. Other provisions of Sections 321-327 imposed a duty upon the Secretary of the Interior to plan and construct, under certain conditions, roads and trails within the State of Alaska. For the purpose of carrying out this duty, the Secretary of the Interior, on October 16, 1951, executed Order No. 2655 (see Appendix A), providing for rights of way for the highways in Alaska.

Order No. 2665 fixed the width of all public highways in Alaska established or under the jurisdiction of the Secretary of the Interior. Two amendments to Order No. 2665 were issued. Amendment No. 2 (Appendix B) concerned the right of way of the highway involved in this suit, the Palmer-Wasilla-Willow Road. Amendment No. 2, dated September 15, 1956, designated the Palmer-Wasilla-Willow Road of which the Wasilla-Big Lake Junction Road was a part thereof, as a through road having a right of way of 150 feet on each side of the center line.

The appellants only contention in regard to the provisions of Section 321d of Title 48, United States Code, and Order No. 2665 of the Department of the Interior with its Amendments, is that it is inapplicable since it was repealed before the case was tried. The appellants fail to acknowledge the well recognized principle of constitutional law and statutory construction that the repeal of a statute creating a vested right does not affect the rights created thereunder. Section 321d created a present property right in the United States or any future state created out of the Territory of Alaska. This right immediately vesting with the issue of every patent granted under the Homestead Laws in Alaska. This right was vested at that time for then there was an ascertained person, the United States, with a present right to the future enjoyment of that right. The repeal of the statute does not affect the right unless it is clear that its repeal intended to divest the United States of this reservation. Such repeal would, in effect, then be a conveyance of the

right to retain by the United States. The appellants have not cited any authority to support this contention, nor have the appellees been able to find any. Therefore, the appellants' contention that the provisions of Section 321d were inapplicable in the present case is erroneous, for the repeal of 321d in 1959 did not affect or extinguish the vested right to the easements for roadways and roads, etc., in the United States.

The second error of law not specified by the appellants but inferred from their brief is the existing trail or road across the appellants' land at the time of the entry and receipt of their patents from the United States contituted an election by the United States or an exercise of the right reserved in the patents. This contention is based on the theory of the *Zack* case which held in effect that the pre-existing road was an election by the United States or the State of Alaska of the right reserved under the patent issued. The *Zack* case, of course, in regard to the appellants' first contention, supports the position of the appellee that even though the statute had been repealed prior to the case it still affected the respective rights of the United States or the State of Alaska and the patent holder or land owner. The theory of the *Zack* case, it is felt by the appellees, is erroneous in that it held that the pre-existing road was an exercise of the right reserved under the patent. This contention appears to the appellees to be illogical for how could the appellee or the State of Alaska exercise a right prior to the right coming into being? The reservation of the right

of way did not arise until the patent was issued and if the roadway existed prior to the issuance of the patent to the appellants, then there could not have been an exercise of that right until some affirmative action was taken on the part of the United States or the future State of Alaska. Appellees would cite as authority in part for their position the case of *Leo Watt Eason, Sr. and Alice G. Eason v. State of Alaska, Department of Public Works, et al.,* which was a Superior Court case, State of Alaska, Third Judicial District, No. 60-956. This is an unreported case and a copy of the entire Memorandum of Decision is attached. (Appendix C.) This case was decided July 3, 1962, and involved the exercise by the State of Alaska of their right contained in the reservation in the patent issued; the same as is involved in the case at bar. However, the roadway involved was the Sterling Highway rather than the Big Lake-Wasilla-Willow Road. The Court held that the authority for the reservation was found in Section 321d of Title 48, United States Code. The facts of the case involved a relocation of a portion of the Sterling Highway which was originally constructed across public domain. However, subsequently homesteads were taken all along the highway, including the plaintiff's homestead. In August of 1958 the Bureau of Public Roads began proceedings for the reconstruction and relocation of a portion of the highway crossing the plaintiff's property. The Court held that the reconstruction and relocation of this highway was a valid exercise of the rights or the reservation retained by the United States

and subsequently transferred to the State of Alaska. The Court further held that after the reservation has been exercised and the right of way has once become fixed, the location cannot be changed without consent of the patentee. The Court held that the relocation of the Sterling Highway subsequent to the entryman and the patent across the plaintiff's homestead was the first exercise of the reservation contained in the patent and, therefore, supports the position of the appellees that until some affirmative action or exercise of the right of way reservation has been taken by the United States or the State of Alaska, there has been no exercise, regardless of the fact that there was a roadway or highway or trail across the land of the patentee at the time that the patent was issued. Further support to the appellees' position is found in the case of the *United States v. Ide*, 277 Fed. 373, at 381. (Eighth Circuit, 1921.) The statute involved in the *Ide* case is similar to the provisions of Section 321d of Title 48, United States Code, in that there was a retention by the United States in the patent of a reservation for the construction of ditches and canals that might be thereafter constructed by the authority of the United States over lands that should be entered and patented subsequent to the passage of the Act. The patentees were not entitled to compensation when there was a reasonable exercise of this right. (See also *Crosley v. Donzeger*, 175 Pac. 809.)

From an examination of that which Appellants designate as their "statement of points relied upon as filed" it is impossible to determine the basis and the

reasons which appellants assert concern such findings of fact to which exception is made. The basic thread which seems to run throughout the statement of points relied upon is, that the findings of fact and the conclusions of law are "contrary to the evidence and contrary to the law and equity." Confronted with this type of specification of error, offered purportedly to comply with Rule 18 (b) of the Rules of the United States Court of Appeals for the Ninth Circuit, Appellees can only assume that the Appellants contend that there was no credible evidence upon which to base the findings of fact and that as such the conclusions of law are without basis, if correct, or are contrary, or are erroneous statements of law.

Rule 52(a) of the Federal Rules of Civil Procedure, provides in part:

> * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

This Court, in the case of *Lundgren v. Freeman,* C.A. 9th, 1962, 307 F. 2d 104, held that findings of fact by the trial Court would be upset only where they are clearly erroneous. Basing this holding on the recognition that:

> A finding of fact to which the clearly erroneous rule applies is a finding based upon the "fact finding tribunals experience with the mainspring of human conduct".

This Court has repeatedly found that findings of fact are presumptively correct and will not be set

aside unless clearly erroneous or based upon an erroneous view of the law. *Paramount Pest Control Service v. Brewer*, C.A. 9th, 1949, 177 F. 2d 564; *Wingate v. Bercut*, C.A. 9th, 1945, 146 F. 2d 725; *Lowe v. McDonald*, C.A. 9th 1955, 221 F. 2d 228.

This Court has also repeatedly held that the Appellate Court will take the view of the evidence which is most favorable to the Appellee, who prevailed in the trial Court. *Bank of America Natl. Trust & Savings v. Hayden*, C.A. 9th, 1956, 231 F. 2d 595; *Paramount Pest Control Service v. Brewer*, supra.

Appellants first except the finding of fact number 2, which found that the Appellants had made their entries subsequent to the construction of the original road, with full knowledge of the reservation required by Title 48, U.S.C. 321d. The Appellant, Myers, testified that the original road was built in 1949 and and this was not contradicted at any place by the Appellant, Weaver. (Transcript, page 11.) The Appellant, Myers, testified that he had lived at his location since 1953 or 1954 (Transcript, page 11), and the Appellant Weaver, testified that he moved on to his property in 1953. (Transcript, page 228.) Both patents provide for a reservation of right of way in favor of the United States or any state which may be created out of the then Territory of Alaska. Both of these patents were admitted in evidence, Myers' Patent as Plaintiff's Exhibit "B" (Transcript, page 10), and Weaver's Patent as Plaintiff's Exhibit "L" (Transcript, page 114.)

Appellants next claim as error, finding of fact number 3, and the basis for this conclusion is discussed in the argument above.

Likewise, it has been discussed above concerning the basis of finding of fact number 4, to which Appellants except and claim error.

Appellants next claim of error is finding of fact number 5. The record reflects that there were offered in evidence by the Appellants, as their Exhibit "N" (Transcript, pages 129-130) concerning maps sent to them which designated the claimed right of way on behalf of the United States of America and the area within which the work was to be done. This information was likewise transmitted to the Appellant, Weaver, and the documents were admitted into evidence as defendants' Exhibit 8-A and 8-B, (Transcript, page 297.)

Appellants next claim as error finding of fact number 6 concerning the road design, and construction over plaintiffs' land being within the reserve of right of way, namely 150 feet on each side of the center line. The witness, Daniel L. Reed of the Appellee, United States of America, testified in 1959 he was the project engineer for the Bureau of Public Roads. (Transcript, page 358.) He testified with regard to the project with which this suit is concerned. He was project engineer (Transcript, page 359.) That the width of the area involving the total road construction throughout, was restricted to a 200 foot limit and that construction was kept within those limits. (Transcript, pages 360-361.)

Appellants next claim error in finding of fact number 7, concerning acquiescence by the appellants concerning the location and width of the road construction. The witness, Reed, testified that various requests were made during the construction program. Requests were made concerning access to adjoining lands (Transcript, page 364) and that at the time, various stripping operations concerning top soil were concerned so as to expose gravel for borrow, the appellant Myers was present and nothing was said by him. (Transcript, page 366.) He testified that during the construction program he had conversations with appellant, Weaver, concerning giving his driveway special attention, which was done. (Transcript, page 374.) Also, the witness testified he authorized certain overburden strip to be pushed on to Mr. Weaver's property which he understood was to be placed there at Mr. Weaver's request. (Transcript, page 385.) The witness, Reed, further testified that he was on the job until the job was completed and and that he received no complaints from Mr. Weaver nor anyone on his behalf. (Transcript, pages 429-430.)

Appellants next claim as error the finding of fact by the Court number 8, concerning the acquiescence by the plaintiffs to the construction of work borne by the defendants into the area in which the construction work was done. This is substantially covered by the argument made above with regard to finding of fact number 7.

Accordingly, from the foregoing, it is clear that there was ample evidence in the record to support

the trial judge's finding based upon his listening to the testimony, observing the witnesses and viewing the various exhibits placed in evidence. Appellants have failed to discharge their burden in showing this Court that the findings of fact of the trial Court were clearly erroneous, and in fact, the contrary appears from the record.

CONCLUSION

From the foregoing, the appellees urge this Honorable Court to uphold the lower Court's findings that the provisions of Section 321d, Title 48, United States Code, created a valid reservation in behalf of the United States and that the construction of the highway in question was a valid exercise of this right. That any acts or conduct on the part of the appellee, McLaughlin, Inc., outside of the 300 foot right of way was with the consent and acquiescence of the appellants and, finally, the lower Court's decision should be affirmed because of the failure of the appellants to make a sufficient showing which would warrant reversal or remanding of the trial Court's decision.

Dated, Anchorage, Alaska,
July 23, 1963.

Respectfully submitted,

WARREN C. COLVER,
United States Attorney,
JAMES R. CLOUSE, JR.,
Assistant United States Attorney,
HUGHES, THORSNESS & LOWE,
DAVID H. THORSNESS,
Attorneys for Appellees.

Certificate of Counsel

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

James R. Clouse, Jr.,
Assistant United States Attorney,
David H. Thorsness,
Attorneys for Appellees.

(Appendices "A", "B" and "C" Follow)

Appendices.

Appendix "A"

United States
Department of the Interior
Washington, D. C.

Order No. 2665 October 16, 1951

Subject: Rights-of-Way for Highways in Alaska

Sec. 1. *Purpose.* (a) The purpose of this order is to (1) fix the width of all public highways in Alaska established or maintained under the jurisdiction of the Secretary of the Interior and (2) prescribe a uniform procedure for the establishment of rights-of-way or easements over or across the public lands of such highways. Authority for these actions is contained in Section 2 of the Act of June 30, 1932 (47 Stat. 446, 48 U.S.C. 321a.)

Sec. 2. *Width of Public Highways.* (a) The width of the public highways in Alaska shall be as follows:

(1) For through roads:

The Alaska Highway shall extend 300 feet on each side of the center line thereof.

The Richardson Highway, Glenn Highway, Haines Highway, Seward-Anchorage Highway, Anchorage-Lake Spenard Highway and Fairbanks-College Highway shall extend 150 feet on each side of the center line thereof.

(2) For feeder roads:

Albert Road (Kodiak Island), Edgerton Cutoff, Elliott Highway, Seward Peninsula Tram road, Steese

Highway, Sterling Highway, Taylor Highway, Northway Junction to Airport Road, Palmer to Matanuska to Wasilla Junction Road, Palmer to Finger Lake to Wasilla Road, Glenn Highway Junction to Fishhook Junction to Wasilla to Knik Road, Slana to Nabesna Road, Kenai Junction to Kenai Road, University to Ester Road, Central to Circle Hot Springs to Portage Creek Road, Manley Hot Springs to Eureka Road, North Park Boundary to Kantishna Road, Paxson to McKinley Park Road, Sterling Landing to Ophir Road, Iditarod to Flat Road, Dillingham to Wood River Road, Ruby to Long to Poorman Road, Nome to Council Road and Nome to Bessie Road shall each extend 100 feet on each side of the center line thereof.

(3) For local roads:

All public roads not classified as through roads or feeder roads shall extend 50 feet on each side of the center line thereof.

Sec. 3. *Establishment of rights of way or easements.*

(a) A reservation for highway purposes covering the lands embraced in the through roads mentioned in section 2 of this order was made by Public Land Order No. 601 of August 10, 1940, as amended by Public Land Order No. 757 of October 16, 1951. That order operated as a complete segregation of the land from all forms of appropriation under the public-land laws, including the mining and the mineral leasing laws.

(b) A right-of-way or easement for highway purposes covering the lands embraced in the feeder roads and the local roads equal in extent to the width of such roads as established in section 2 of this order, is hereby established for such roads over and across the public lands.

(c) The reservation mentioned in paragraph (a) and the rights-of-way or easements mentioned in paragraph (b) will attach as to all new construction involving public roads in Alaska when the survey stakes have been set on the ground and notices have been posted at appropriate points along the route of the new construction specifying the type and width of the roads.

Sec. 4. *Road maps to be filed in proper Land Office.* Maps of all public roads in Alaska heretofore or hereafter constructed showing the location of the roads, together with appropriate plans and specifications, will be filed by the Alaska Road Commission in the property Land Office at the earliest possible date for the information of the public.

/s/ Oscar L. Chapman
Secretary of the Interior

Appendix "B"

United States
Department of the Interior
Washington 25, D. C.

Order No. 2665 (October 16, 1951), Amendment No. 2

Subject: Rights-of-Way for Highways in Alaska

1. Section 2 (a) (1) is amended by adding to the list of public highways designated as through roads, the Fairbanks-International Airport Road, the Anchorage-Fourth Avenue-Post Road, the Anchorage International Airport Road, the Copper River Highway, the Fairbanks-Nenana Highway, the Denali Highway, the Sterling Highway, the Kenai Spur from Mile 0 to Mile 14, the Palmer-Wasilla-Willow Road, and the Steese Highway from Mile 0 to Fox Junction; by redesignating the Anchorage-Lake Spenard Highway as the Anchorage-Spenard Highway, and by deleting the Fairbanks-College Highway.

2. Section 2 (a) (2) is amended by deleting from the list of feeder roads the Sterling Highway, the University to Ester Road, the Kenai Junction to Kenai Road, the Palmer to Finger Lake to Wasilla Road, the Paxson to McKinley Park Road, and the Steese Highway, from Mile 0 to Fox Junction, and by adding the Kenai Spur from Mile 14 to Mile 31, the Nome-Kougarok Road, and the Nome-Teller Road.

/s/ Fred A. Seaton
Secretary of the Interior

Appendix "C"

In the Superior Court for the State of Alaska
Third District

Leo Watt Eason, Sr., and Alice G. Eason, Plaintiffs, vs. State of Alaska, Dept. of Public Works, et al., Defendants.	No. 60,956

TRANSCRIPT OF MEMORANDUM OF DECISION

The Honorable James M. Fitzgerald
Superior Court Judge

Anchorage, Alaska
July 3, 1962
11:35 o'clock a.m.

Appearances: (at trial)
For the Plaintiffs:

James J. Delaney
Attorney at Law
220 Central Building
Anchorage, Alaska

For the Defendants:

Mary Frank
Assistant Attorney General
606 Fourth Avenue
Anchorage, Alaska

PROCEEDINGS

By Judge James M. Fitzgerald:

Plaintiffs brought a claim in this court September 29th, 1960. The plaintiffs obtained a patent from the United States June 6th, 1952 to:

> The Southwest one-quarter (SW 1/4) of the Northeast one-quarter (NE 1/4) and the Southeast 1/4 (SE 1/4) of the Northeast one-quarter (NE 1/4), Section Four (4), Township 5 South, Range 15 West, Seward Meridian. (Defendant's exhibit I)

On May 13th, 1958 the plaintiffs alleged that E. H. Swick, Regional Engineer of the Bureau of Public Roads, United States Department of Commerce, sent plaintiffs a notice of utilization of part of the plaintiffs' homestead in order to relocate the Sterling Highway. (See plaintiffs' exhibit 2.) Plaintiffs contend that they have been denied just compensation, contrary to the laws of the United States and the State of Alaska. Plaintiffs seek an injunction preventing the use of the roadway by the State or in the alternative damages for the taking.

The State made an answer alleging that the Sterling Highway is presently in use and that plaintiffs have received just compensation in the amount of $150 for any interest which they may possess on the land in question.

For purposes of pre-trial and trial, Eason v. State was consolidated with Straley, et al v. State, No. 61-616. Several other and additional principles may be involved in the Straley case and each case will be treated separately for purposes of decision.

The patent under which the plaintiffs hold contains a reservation:

> "And there is reserved from the lands hereby granted, a right of way thereon for roads, roadways, highways, tramways, trials, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or of any State created out of the Territory of Alaska, in accordance with the Act of July 24th, 1947." (61 Stat. 41 E) (See defendants' exhibit I.)

The authority for the reservation is found under the Act of July 24th, 1947, codified at 48 USCA 321 (d). The purpose of the Act of July 24th, 1947 was to enable the then Alaska Road Commission, an agency of the United States Department of the Interior, to acquire right-of-way for roads across patented lands in Alaska without the expenditure of federal funds. The Act further provided that the acquiring agency must pay for crops and improvements placed on the land by the patentee. (See U.S. Code Congressional Service First Session 1947 at pages 1352 and 1353.) But 48 USCA 321 (d) was repealed by the Alaska Omnibus Act. Public Law 86-70 effective July 1, 1959.

Plaintiffs received their patent from the United States on June 6th, 1952. The first entry on the S ½ NE ¼, NE ¼ SE ¼, Sec. 4, NW ¼ SW¼ Sec. 3, Township 5 South, Range 15 West Seward Meridian, containing 160 acres was made by Willis Gayer Graham. (See defendants' exhibit E) His entry was closed out April 7th, 1948. On the same day that Graham's entry was closed out, Eugene E. Still made

an entry on the S ½ NE ¼, NE ¼ SE ¼, Sec. 4, Township 5 South, Range 15 West, Seward Meridian, containing 80 acres. This entry was closed out February 18th, 1949. And on February 18th, 1949 Eason made his entry on the same tract and subsequently obtained a patent June 6th, 1952.

The Sterling Highway at this point was first located on the public domain. (See defendants' exhibit 0) Eventually all homesteads along the highway, including the Eason homestead, were taken up.

A subsequent reorganization of the executive branch placed responsibility for road construction and maintenance in Alaska in the Bureau of Public Roads, Department of Commerce, rather than the Alaska Road Commission, and on May 13th, 1958 the Bureau of Public Roads gave notice to the plaintiffs that the Bureau intended to utilize 9.21 acres of the Eason homestead for the purpose of relocating the Sterling Highway. The notice of utilization was given pursuant to the reservation in the Eason patent and the Act of July 24th, 1947. In August of 1958 the Bureau of Public Roads advertised for bids to relocate this portion of the Sterling Highway. On September 8th, 1958 the bid was awarded and on October 10th, 1958 notice was given to the successful contractor to proceed. Construction started on November 3rd, 1958. Thereafter, on the 30th day of June, 1959 the Bureau of Public Roads, Department of Commerce, conveyed its interest in the highway to the State of Alaska under the provisions of Sec. 21 of the Act of June 25th, 1959. (See defendants' exhibit G)

A reservation such as contained in plaintiffs' patent is valid for it is within the power of the United States to issue a patent subject to a reservation of the type contained in the patent which plaintiffs hold.

I find that 48 USCA 321 (d) was a valid exercise of the legislative power. The repealing act Public Law 86-70 does not lend itself to a construction that it was intended to destroy all reservations contained in those patents issued subject to the Act of July 24th, 1947. It is clear that the location and limits of right-of-way reserved by the patent were not defined. Therefore, a reasonable convenient and suitable way must be intended. Moreover, the location of the right-of-way must be reasonable and not interfere unduly with the enjoyment of the subject interest. After the reservation has been exercised and the right-of-way has once become fixed the location cannot be changed without the consent of the patentee.

I find that the relocation of the Sterling Highway along the line across the Eason homestead was the first exercise of the reservation contained in the patent. And it is presumed that the public officers involved in the selection of the right-of-way acted according to law. No proof has been offered to show that the selection of the right-of-way was unreasonable or in bad faith. The reservation found in the Eason patent is apparently included in all patents issued by the United States from July 24th, 1947 until July 1st, 1959.

Patents issued before or after the operative period of the Act of July 24th, 1947 are not affected by the

reservation. This is perhaps unfair, but the remedy for this must be provided by the Legislature. As it stands the Act is not unconstitutional nor can any intent be found in the repealing act to destroy the reservation.

This memorandum may stand for Findings of Fact and Conclusions of Law and the State may prepare the appropriate Judgment denying the relief prayed for by the plaintiffs. Neither side shall be awarded costs or attorney's fees.

End of Record

Certificate

Superior Court
State of Alaska.—ss.

I, Joyce L. Maugan, Transcript Secretary for the Superior Court, State of Alaska, Third Judicial District, hereby certify:

That the foregoing pages numbered 2 through 6 contain a full, true and correct transcript of proceedings in cause No. 60-956, Eason vs. State of Alaska (memorandum of decision), Third Judicial District; transcribed by me to the best of my knowledge and ability from Third Judicial District Soundscriber tape identified as follows:

B-95, log numbers 0096 through 0114.

Dated at Anchorage, Alaska this 3rd day of July, 1962

Signed and Certified to by:
/s/ Joyce L. Maugan
Joyce L. Maugan
Transcript Secretary

No. 18545

United States
COURT OF APPEALS
for the Ninth Circuit

ALBINA ENGINE AND MACHINE WORKS,
an Oregon corporation, and
FIREMAN'S FUND INSURANCE COMPANY,
a California corporation,

Appellants,

v.

J. J. O'LEARY, Deputy Commissioner,
Bureau of Employees' Compensation,
Department of Labor, and HILDA O'BRIEN,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

GRAY, FREDERICKSON & HEATH,
LLOYD W. WEISENSEE,
1005 Equitable Building, Portland 4, Oregon,
Proctors for Appellants.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-63

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APPENDIX

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INDEX OF AUTHORITIES (Cont.)

STATUTORY AND CONSTITUTIONAL PROVISIONS

No. 18545

United States
COURT OF APPEALS
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ALBINA ENGINE AND MACHINE WORKS,
an Oregon corporation, and
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a California corporation,

Appellants,

v.

J. J. O'LEARY, Deputy Commissioner,
Bureau of Employees' Compensation,
Department of Labor, and HILDA O'BRIEN,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

APPELLANTS' BRIEF

JURISDICTION

Appellants seek review of an award of widow's benefits to appellee Hilda O'Brien (hereinafter "claimant") by appellee J. J. O'Leary, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C.A. § 901 *et seq.*

This is a civil suit in admiralty commenced by a Libel in Personam to review the compensation order of appellee J. J. O'Leary awarding widow's benefits. The compensation order was made and entered the 14th day of August, 1962; suit was filed the 11th day of September, 1962 (Tr. 12). The District Court had jurisdiction by virtue of 33 U.S.C.A. § 921 (b). The suit was properly commenced in admiralty. Const. Art. 3, § 2. The factual basis for jurisdiction is set forth in Article IV of the Libel (Tr. 4). On January 21, 1963, the District Court by Judgment Order in a final decision on the merits dismissed the Libel on Motion for Summary Judgment (Tr. 57-58). Libelants filed their Notice of Appeal on February 1, 1963 (Tr. 59). This Court has jurisdiction pursuant to 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

On June 17, 1957, while the SS MONMOUTH was being repaired by Albina Engine & Machine Works, Albina's employee John C. O'Brien was injured when scaffolding fell (Tr. 9). The death of John C. O'Brien from the injuries received occurred on May 15, 1961 (Tr. 9).

By the filing of a claim form dated May 24, 1961, (Carrier's Exh. 1) Hilda O'Brien sought widow's benefits authorized by the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C.A. § 909, claiming to be the widow of John C. O'Brien by virtue of a ceremonial marriage before a "Justice of Peace" on November 24, (year omitted) in Idaho.

The claim was controverted (Tr. 13, 14) and a formal hearing was held by J. J. O'Leary, Deputy Commissioner (Tr. 8). Hilda O'Brien never entered into a ceremonial marriage with the deceased John C. O'Brien (Tr. 20).

On July 2, 1929, John C. O'Brien married and thereafter lived with his wife until March 11, 1937 (Tr. 9). The marriage of July 2, 1929, was dissolved by divorce on April 10, 1943 (Tr. 10). Meanwhile, during November, 1938, John C. O'Brien and the claimant began living together in Middleton, Idaho (Tr. 9, 19). On September 12, 1942, the decedent and claimant moved to the State of Oregon (Tr. 10, 20, 21).

From 1943 until 1946 the decedent and claimant made annual vacation trips to Idaho to visit relatives (Tr. 10, 22, 23). On each occasion the visit would be between a week and two weeks (Tr. 10, 22).

Throughout the period of time that the decedent John C. O'Brien and claimant lived together they held themselves out to be and were known as husband and wife (Tr. 10, 22, 24, 30, 31).

At the hearing before the Deputy Commissioner the claimant attempted to prove that a marriage was created by virtue of having lived with John C. O'Brien as his wife. The Deputy Commissioner so ruled, finding that the annual visits to Idaho ". . . were sufficient to create or confirm the marital relationship . . ." existing from 1938 (Tr. 10). An award of death benefits to Hilda O'Brien as "surviving wife" was made (Tr. 11).

The questions of this appeal are raised by the appel-

lants' assignments of error directed to the District Court's Summary Judgment in favor of the respondents. Basically, the questions to be decided are:

1) Whether the public policy of Oregon prohibits entering into a common-law marriage by its residents on visits to Idaho;

2) Whether Idaho would permit visitors to enter into a common-law marriage, and if so, under what conditions;

3) If not prohibited by the public policy of the State of Oregon and permissible according to the law of Idaho, whether there is sufficient evidence in the record to permit a finding that John C. O'Brien and the claimant formed a marriage on visits to Idaho.

SPECIFICATIONS OF ERROR

The District Court erred in granting appellee J. J. O'Leary's Motion for Summary Judgment and dismissing the Libel for the reason that the District Court should have enjoined enforcement of the Compensation Order and Award of Death Benefits by appellee J. J. O'Leary dated August 14, 1962, on the grounds that:

1) There was no evidence upon which a determination could have been made that the appellee Hilda O'Brien was the lawful wife of decedent;

2) The appellee Hilda O'Brien and decedent could not and did not establish a marriage prior to decedent's 1943 divorce, as a marriage the relationship was void;

3) The decedent and appellee Hilda O'Brien could not and did not establish a marriage on visits to Idaho after the decedent's 1943 divorce;

4) The appellee Hilda O'Brien is not the surviving wife of the decedent and is not entitled to widow's benefits for her support pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

SUMMARY OF ARGUMENT

In order to qualify for widow's benefits under the Longshoremen's and Harbor Workers' Compensation Act the claimant must prove a lawful marriage. The formation and existence of marriage is a question of state not federal law. Having conceded the lack of a ceremonial marriage, the claimant must show a common-law marriage in order to qualify for widow's benefits. The claimant and deceased could not enter into a common-law marriage on visits to Idaho by virtue of the public policy of the State of Oregon. If not prohibited by Oregon law and permissible under Idaho law to enter into a common-law marriage on a visit to Idaho, there is no evidence in the record to sustain a finding of such a marriage on the part of the claimant.

ARGUMENT

This Court may review the record to see if the findings of the Deputy Commissioner are supported by evidence and correct application of law. See e.g. *U. S.* v. *Pan Am World Airways, Inc.,* 299 F.2d 74 (5th Cir., 1962).

A Lawful Marriage Is Necessary

After enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927 the courts decided that the terms "widow" (33 U.S.C.A. § 902(16)) and "surviving wife" (33 U.S.C.A. § 909) meant that a valid common-law or ceremonial marriage according to state law must have existed. *Bolin* v. *Marshall,* 76 F.2d 668 (9th Cir., 1935) cert. den. 296 U.S. 573, 56 S. Ct. 116, 80 L. Ed. 404; *Green* v. *Crowell,* 69 F.2d 762 (5th Cir. 1934) cert. den. 293 U.S. 554, 55 S. Ct. 88, 79 L. Ed. 656. Rights under other federal statutes dependent on marital status are also determined by reference to state domestic relations laws. In *DeSylva* v. *Ballentine,* 351 U.S. 570, 580, 76 S. Ct. 974, 980, 100 L. Ed. 1415, 1427 (1956) the court said: "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state rather than federal law . . . there is no federal law of domestic relations . . ." In *Beebe* v. *Moormack Gulf Line, Inc.,* 59 F.2d 319 (5th Cir. 1932), a seaman's "widow" was held to have no action for wrongful death under the Jones Act, 46 U.S.C.A. § 688, where the alleged marriage was void under the laws of Louisiana.

In the instant case, the Deputy Commissioner impliedly acknowledged that the proper procedure required the application of state law. The acknowledgement is inherent in his finding that a marriage was "create(d) or confirm(ed)" on visits to Idaho (Tr. 10). Such a finding was undoubtedly premised on either or both of two propositions: 1) There were no facts in evi-

dence on which to predicate a finding that a common-law marriage was formed in Oregon; or 2) A common-law marriage could not be formed in Oregon but could be formed in Idaho. Appellants assume, arguendo for purposes of this appeal, that the Deputy Commissioner premised his findings on the proposition that a common-law marriage may not be formed in Oregon but may be in Idaho. Oregon does not permit parties to enter into common-law marriages. *Huard* v. *McTeigh,* 113 Or. 279, 232 Pac. 658 (1925). This court has applied the holding in *Huard* v. *McTeigh* and denied widow's benefits to a claimant under the Longshoremen's and Harbor Workers' Compensation Act. *Bolin* v. *Marshall, supra.* Idaho permits common-law marriages. § 32-201, Idaho Code.

As the claimant directly admitted before the Deputy Commissioner that she was not ceremonially married to John C. O'Brien, her only ground for claiming a marriage was to assert the formation of a common-law marriage on the basis of visits to Idaho. The Deputy Commissioner held that a marriage was created or confirmed on visits to Idaho.

At least to the extent that a man and woman were residents of the lex loci contractus at the time of the purported marriage, Oregon recognizes and follows the rule that a marriage valid where contracted is valid everywhere. *Boykin* v. *SIAC,* 224 Or. 76, 355 P.2d 724 (1960).

In this case, the parties began living together in Idaho in 1938 (Tr. 19). The relationship attained no legal status having any attributes of a marriage because John C. O'Brien was married to another woman at that time

(Tr. 9, 10). The relationship existing prior to 1943 could not ripen into a valid marriage in Oregon after the removal of the impediment in 1943 because it was void and the parties were living in Oregon. *Huard* v. *McTeigh, supra.* Therefore, the finding of the Deputy Commissioner that the parties ". . . entered into a common-law relationship . . ." (Tr. 9) is of no legal significance.

The ultimate question in this case is whether visits to Idaho in the context of the findings by the Deputy Commissioner confirmed or created a common-law marriage.

No marriage could have been formed in this case for two reasons. The first reason is that the public policy of the State of Oregon prohibits its residents from entering into a common-law marriage while visiting a neighboring state. Secondly, even if it were possible to marry on visits, Idaho would not permit such marriage by non-residents or would require objective evidence of a marriage contract.

Oregon's Public Policy Against Common-Law Marriages

The public policy of the State of Oregon was best put by the Supreme Court of Oregon when it stated: "In our opinion the doctrine of common-law marriages is contrary to public policy and public morals. It places a premium upon illicit cohabitation and offers encouragement to the harlot and the adventuress. We do not sanction loose marriages or easy divorces. . . . We are convinced that the conclusions herein reached are in keeping with the public policy of this state . . ." *Huard*

v. *McTeigh,* 113 Or. 279, 295, 296, 232 Pac. 658, 663 (1925). In ruling Oregon's marriage statutes mandatory, the Oregon Supreme Court rejected the holding of the Supreme Court of the United States in *Travers* v. *Reinhardt,* 205 U.S. 423, 51 L. Ed. 865 (1907) that marriage laws were only directory. 113 Or. at 291, 232 Pac. at 662. Should there be any doubt about the public policy of the State of Oregon, one has only to measure the aftermath of the decision in *Huard* v. *McTeigh,* supra. The legislature immediately passed an act legitimatizing the children of meretricious relationships by declaring the parents, under certain conditions, married. Oregon Laws 1925, Chapter 269. However, even this concession to protect the innocent was repealed after the only case interpreting the statute reached the Oregon Supreme Court. The case of *Wadsworth* v. *Brigham,* 125 Or. 428, 259 Pac. 299, 266 Pac. 875 (1928) was followed by repeal of the statute of 1925.[1] Oregon Laws 1929, Chapter 149.

This court has recognized and followed the policy against common-law marriages expressed by the Oregon Supreme Court. *Bolin* v. *Marshall, supra.*

One of the effects of strong public policy is to prohibit evasion of such policy by visitation to another jur-

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[1] Lest it be argued to this court that the repeal of the law of 1925 was not a further expression of policy against common-law marriages because its enactment cured all "defective marriages" it is pointed out that the repeal of the act without a savings clause may have effected a restoration of the status of all persons as it was before the 1925 statute, i.e., repeal meant the repealed statute never existed. *Fisk* v. *Leith,* 137 Or. 459, 299 Pac. 1013, 3 P.2d 535 (1931); *Drainage District No. 7* v. *Bernards,* 89 Or. 531 at 555, 174 Pac. 1167 (1918). In any event, the repeal is a legislative expression of policy against common-law marriages complementary to the legislative intent discussed in *Huard* v. *McTeigh, supra.*

isdiction. The effect may be illustrated by references to cases where marriages of parties in another state within six months of divorce in violation of the mandate of Oregon divorce laws are held void. See e.g. *Wright* v. *Kroeger,* 219 Or. 102, 345 P.2d 809 (1959). In the case of *Sturgis* v. *Sturgis,* 51 Or. 10, 16, 93 Pac. 696, 698 (1908) the court pointed out that where public policy prohibited certain marriages the prohibition could not be evaded by contracting marriage in another state.

Referring to the public policy of Oregon, the Washington Supreme Court has held as an alternative basis for a decision denying custody of children to the purported "husband" that Oregon residents could not enter into a common-law marriage in Idaho. *State* v. *Superior Court,* 23 Wash 2d 357, 161 P2d 188 (1945).

The recent decision in *Metropolitan Life Insurance Co.* v. *Chase,* 294 F.2d 500 (3rd Cir. 1961) illustrates the application of a state's public policy to facts very similar to those here. In the *Chase* opinion, Judge Maris explained that the public policy of New Jersey against common-law marriages could not be frustrated or evaded by journeying to a jurisdiction permitting the creation of common-law marriages.

In *Norcross* v. *Norcross,* 155 Mass. 374, 29 N.E. 506 (1892) the court held that residents of Massachusetts, a state not permitting common-law marriages, could not enter into a common-law marriage during a visit to New York, a state which at that time permitted such marriages.

In considering whether the law of the domicile or law

of the place of the contract prevails, Idaho recognizes that where a question of public policy is in issue, the law of the domicile controls. The Supreme Court of Idaho has stated: "A state may declare what marriages it will recognize as valid no matter where performed, and a claimed or purported marriage may be declared void when it is contrary to the positive law of the state of the domicile of the parties." *Duncan* v. *Jacobson Construction Co.,* 83 Idaho 254, 360 P.2d 987, 990 (1961). The foregoing expression by the Supreme Court of Idaho is recognition that marital status, as a rule of conflict of laws, is determined by the law of the state of the domicile. *Loughran* v. *Loughran,* 292 U.S. 216, 54 S. Ct. 684, 78 L. Ed 1219 (1934).

The importance of residence within the state of the common-law marriage at the time it was created is emphasized by the case of *Travers* v. *Reinhardt, supra.* In *Travers* the Supreme Court pointedly referred to the fact that the parties were *domiciled* in New Jersey at the time of the claimed marriage and that based upon domicile in a state such as New Jersey, which permits the formation of common-law marriage, a marriage was created.

In view of the public policy of the State of Oregon, the Deputy Commissioner and the District Court should have ruled the claimed marriage based on visits to Idaho void.

Non-Resident Common-Law Marriages in Idaho

Under what circumstances will common-law marriages by visitors be permitted? The problem in the cases considering the question seems to be whether the test of the creation of common-law marriages will be the same for non-residents as for residents. The distinction between residents and non-residents is apparently bottomed on queries such as: Will persons flying over the common-law state be deemed to have married? Will persons driving through the state be deemed married? Will persons staying overnight be deemed married? Because of the myriad possible fact situations regarding transients, courts considering the problem have imposed more stringent requirements for the creation of a non-resident common-law marriage. Appellants have been unable to find a case involving visitors to Idaho; however, there is no reason to believe that the Idaho Supreme Court, if it permitted common-law marriages by visitors, would adopt a test different from other courts which have considered the problem.

In *Marek* v. *Flemming,* 192 F. Supp. 528 (S.D. Tex. 1961) the plaintiff claimed to have entered into a common-law marriage in Texas by virtue of a week's visit in 1955 with friends in Texas during which she was introduced to friends and relations by the deceased "husband" as his wife. In denying benefits to the plaintiff, the District Court held that a visit to Texas was insufficient to establish a marriage. The Texas case relied upon by the District Court was *Kelly* v. *Consolidated Underwriters,* 300 S.W. 981, afd. 15 S.W.2d 229 (1929).

This Court has had occasion to consider the effect of a visit to Texas from California in the case of *Tatum* v. *Tatum,* 241 F.2d 401 (9th Cir. 1957). In the *Tatum* case, the proceeds of a policy of insurance under the Federal Employees' Group Life Insurance Act were denied to the "wife" because visits to Texas without a specific agreement of marriage did not result in the formation of a common-law marriage.

The visits of Nebraska residents to Colorado have been held not to result in a common-law marriage. *Binger* v. *Binger,* 158 Neb. 444, 63 N.W.2d 784 (1954). The court's syllabus, inter alia, states that a mere holding out as husband and wife while temporarily in a common-law marriage state is insufficient; there must be an intention or agreement of contracting a marriage.

Applying the holdings of the *Marek, Tatum* and *Binger* cases to this case, it is apparent that the claimant is not the widow of John C. O'Brien. The claimant did not testify that she agreed to be the wife of John C. O'Brien while they were visiting Idaho. As a matter of fact, her testimony shows there never was any agreement. Her testimony in this regard was that when she and the deceased began living together in 1938, "we just agreed that we were going to live together, and we did." (Tr. 20). "Q. At the time that you started living with him, Mrs. O'Brien, did you have any discussion regarding marriage? A. No." (Tr. 38). Coupling this testimony with the claim form (Carrier's Exhibit 1) asserting a ceremonial marriage, it is apparent that the parties never made an agreement to be married either before or after

the decedent's divorce or in or out of Idaho. Significantly, the Deputy Commissioner failed to find a marriage agreement (Tr. 9, 10); he did find a "common-law relationship" (Tr. 9) and a holding out as husband and wife (Tr. 10). He also found that the parties were known as husband and wife (Tr. 10). The Deputy Commissioner correctly made no finding of an agreement of marriage because where all the evidence has been presented by direct testimony, presumptions or inferences, which might otherwise have been applicable, have no place in the proceedings. *Del Vecchio* v. *Bowers,* 296 U.S. 280, 286, 56 S. Ct. 190, 80 L. Ed. 229, 233 (1935); *John W. McGrath Corporation* v. *Hughes,* 264 F.2d 314, 317 (2nd Cir. 1959); *French* v. *SIAC,* 156 Or. 443, 68 P.2d 466 (1937). Therefore, assuming arguendo the possibility of a common-law marriage by visitors to Idaho, there is no evidence in this case satisfying the requirements of express intention and agreement of marriage while in Idaho.

There is no indication in the decisions of the Idaho Supreme Court to indicate that visitors could enter into a common-law marriage while in Idaho in any event. Examination of Idaho cases leads one to the conclusion that the policy of the state generally tends toward the recognition of marriage of residents as opposed to labeling a relationship meretricious. See e.g. *Foster* v. *Diehl Lumber Company,* 77 Idaho 26, 287 P.2d 282 (1955); *Mauldin* v. *Sunshine Mining Co.,* 61 Idaho 9, 97 P.2d 608 (1940). However, visitors to Idaho cannot say that they have cohabited together in Idaho. In the *Mauldin* case the court said in finding a common-law marriage that the

parties "cohabited" as husband and wife. 61 Idaho at 20, 97 P.2d 608 at 612. Visitors do not establish a dwelling or residence at the place visited. There is no establishment of a marital habitation. Although considering actions of the parties themselves after a valid marriage, the case of *Thompson* v. *Lawson,* 347 U.S. 334, 74 S. Ct. 555, 98 L. Ed. 733 (1954) seems to express the point most succinctly in requiring a "conjugal nexus" as a basis for an award of widow's benefits under the provisions of 33 U.S.C.A. § 902 (16). Here the claimant and John C. O'Brien established no "conjugal nexus" or cohabitation in Idaho or with Idaho while visiting there; there would be no reason for Idaho to apply the policy favoring marriage as expressed in the cases construing the Idaho Code § 32-201.

CONCLUSION

There is no legal or factual basis for any conclusion that the claimant in this case was married to John C. O'Brien. The District Court erred in granting the Motion for Summary Judgment and refusing to enjoin enforcement of the compensation order. There is no evidence in the record in this case showing an agreement on the part of the claimant and John C. O'Brien to enter into a common-law marriage while on visits to Idaho nor does it appear as a matter of law that Idaho would permit such non-residents to enter into a common-law marriage in that state in any event. Furthermore, and of first magnitude, this court should follow the public policy of Oregon against common-law marriages of its resi-

dents because such a decision ". . . will best foster a higher and greater reverence for the marriage relation, which, in fact, is the very foundation upon which our government rests." *Huard* v. *McTeigh,* 113 Or. 279, 296, 232 Pac. 658, 663 (1925).

Respectfully Submitted,

GRAY FREDERICKSON & HEATH,
LLOYD W. WEISENSEE,
Proctors for Appellants.

APPENDIX OF EXHIBITS

Exhibit	Identified	Offered	Received
Claimants 1	25	25	25
Claimants 2	25	25	25
Claimants 3	25	25	25
Claimants 4	25	27	28
Claimants 5	25	27	28
Carriers 1	45	45	45

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LLOYD W. WEISENSEE,
of Proctors for Appellants.

No. 18,547

IN THE

United States Court of Appeals

For the Ninth Circuit

THOMAS TABOR and AGNES F. TABOR,
Appellants,

vs.

TERESA C. ULLOA,
Appellee.

OPENING BRIEF OF APPELLANTS

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No. 18,547

IN THE

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Appellants,

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Appellee.

OPENING BRIEF OF APPELLANTS

JURISDICTION

The jurisdiction of the trial court over this civil action is sustained by 48 U.S.C. Section 1424(a) (1958 ed.). The jurisdiction of this court to review the judgment of the trial court appealed from is sustained by 28 U.S.C. Section 1291 (1958 ed.) and 28 U.S.C. Section 1294(4) (Supp. III, 1958 ed.).

The complaint (R., doc. 1) is the pleading which shows the existence of the jurisdiction of the trial court over this civil action. The notice of appeal (R., doc. 7) is the pleading which shows the existence of the jurisdiction of this court to review the judgment of the trial court appealed from.

THE CASE

This is a civil action for a partition,

> "1. This civil action arises under Section 22 of the Organic Act of Guam and Sections 62, 82 and 752 of the Code of Civil Procedure of Guam.
>
> "2. Plaintiffs and defendant are and at all times mentioned herein were the owners as tenants in common of certain realty denominated 'Lot 15, Block 5, Municipality of Barrigada, territory of Guam.'
>
> "3. Plaintiffs have and at all times mentioned herein had an undivided half interest in the aforesaid realty.
>
> "4. Defendant has and at all times mentioned herein had an undivided half interest in the aforesaid realty.
>
> "Wherefore plaintiffs and each of them pray judgment for a partition of the aforesaid realty or, in case partition cannot be had without great prejudice to the owners, for the sale of said realty and partition of the proceeds according to the respective interests of the parties." (R., doc. 1)

which the trial court dismissed for lack of jurisdiction over the subject matter:

> "THE COURT: . . . [T]he action has to be dismissed upon the ground no jurisdictional ground is stated to give this court jurisdiction.
>
> ". . . . .
>
> "THE COURT: . . . [T]here is no jurisdiction upon the basis of this complaint in this court.
>
> ". . . . .
>
> "THE COURT: There is a growing tendency to try to wish upon this court jurisdiction which

properly belongs in the Island Court. The Court is going to have to stop it because the Court cannot make encroachments upon the jurisdiction of the Island Court . . . .

". . . . .

"THE COURT: Well, the Court will dismiss the complaint upon the ground that no facts are stated which gives the court jurisdiction.

"MR. TRAPP: If your Honor please, the plaintiff does not intend to amend, so I will ask the Court if it takes that view to dismiss the action at this time.

"THE COURT: Very well, upon the motion of the plaintiff——

". . . . .

"THE COURT: To the effect that they have no desire to amend and wish to stand upon the complaint, the action is dismissed." (R., doc. 6, pp. 2-6.)

ERROR RELIED UPON

The error upon which appellants rely is *the dismissal* by the trial court of this civil action for a partition for lack of jurisdiction over the subject matter.

ARGUMENT

JURISDICTION OVER A CIVIL ACTION FOR A PARTITION HAS NOT BEEN TRANSFERRED BY THE GUAM LEGISLATURE TO THE OTHER COURT ESTABLISHED BY IT, AND, THEREFORE, THE TRIAL COURT HAS JURISDICTION OVER SUCH A CIVIL ACTION AND ERRED IN DISMISSING THIS CIVIL ACTION FOR A PARTITION FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER.

According to the Organic Act of Guam,

". . . The District Court of Guam . . . shall have original jurisdiction in all . . . causes in Guam,

jurisdiction over which has not been transferred by the legislature to other court or courts established by it . . . ." 48 U.S.C. Section 1424(a) (1958 ed.) (emphasis added.)

This is a civil action for a partition. (R., doc. 1.)

Jurisdiction over a civil action for a partition has not been transferred by the Guam Legislature to the other court established by it, and, therefore, the trial court has jurisdiction over such a civil action and erred in dismissing this civil action for a partition for lack of jurisdiction over the subject matter.

Respectfully submitted,

TURNER, BARRETT & FERENZ,
By HOWARD G. TRAPP,
Attorneys for Appellants.

CERTIFICATION

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

HOWARD G. TRAPP

(Appendix Follows)

Appendix.

Appendix

STATUTES CITED

"The courts of appeals shall have jurisdiction of appeals from all final decisions of . . . the District Court of Guam . . . ." 28 U.S.C. Section 1291 (1958 ed.).

"Appeals from reviewable decisions of the . . . territorial courts shall be taken to the courts of appeals as follows:

". . . . .

"(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit." 28 U.S.C. Section 1294 (Supp. III, 1958 ed.).

". . . The District Court of Guam . . . shall have original jurisdiction in all . . . causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it . . . ." 48 U.S.C. Section 1424(a) (1958 ed.).

No. 18,548

IN THE

United States Court of Appeals

For the Ninth Circuit

A. V. WORLEY and E. FLOYD HALL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California

BRIEF FOR THE APPELLEE

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No. 18,548

IN THE

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BRIEF FOR THE APPELLEE

OPINION BELOW

The Memorandum and Order of the District Court (R. 13-18) are not reported.

JURISDICTION

This action was brought by the United States in the District Court for the Northern District of California, pursuant to 28 U.S.C., Sections 1340 and 1345, and Sections 7401 and 7403 of the Internal Revenue Code of 1954, to foreclose its liens for federal taxes

against certain reserve accounts maintained by the defendant, E. Floyd Hall, a delinquent taxpayer, with two named finance companies, which had been paid over to the defendant, A. V. Worley, appellant herein, pursuant to written instruments which had been executed by the delinquent taxpayer after notice of the federal tax liens had been duly filed. (R. 3-6.) The judgment of the District Court in favor of the United States was entered on November 6, 1962. (R. 23-24.) Within sixty days thereafter, notice of appeal was filed by the defendant, A. V. Worley, on December 28, 1962. (R. 25.) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

The appellant, A. V. Worley, took from the delinquent taxpayer a promissory note and the written instruments here in issue for valuable consideration and without actual notice of the outstanding federal tax liens against property of the delinquent taxpayer, and the only question presented by this appeal is whether the designated reserve accounts of the taxpayer were "securities", i.e., "money", within the meaning of Section 6323(c) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1958 ed., Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Terri-

tory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) *With clerk of District Court for District of Columbia.*—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) *Form of Notice.*—If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) *Exception in Case of Securities.*—

(1) *Exception.*—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase

such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) *Definition of security.*—As used in this subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

* * * * * * *

(26 U.S.C. 1958 ed., Sec. 6323.)

STATEMENT

The facts found by the District Court (R. 19-21) are not in dispute and may be summarized.

On June 20, 1955, and on May 31, 1956, respectively, the Commissioner of Internal Revenue made assessments against the delinquent taxpayer, E. Floyd Hall, for income taxes for the years 1954 and 1955 in the respective amounts of $2,698.80 and $12,849.34; and on August 15, 1956, the Commissioner made an assessment against the same E. Floyd Hall of employment withholding taxes for the second quarter of 1956 in the sum of $1,232.19. Notice of federal tax lien covering the June 20, 1955, assessment was duly filed with the County Clerk of Sacramento County, Cali-

fornia, on June 25, 1956; notice of federal tax lien covering the May 31, 1956, assessment was similarly filed on June 25, 1956, and again on August 29, 1956; and notice of federal tax lien covering the August 15, 1956, assessment was similarly filed on November 9, 1956. There is currently outstanding on the June 20, 1955, assessment an unpaid balance of $2,494.80, together with interest as provided by law; the entire amount of the May 31, 1956, assessment, plus interest, is currently due and unpaid; and a balance of $684.36, plus interest, is outstanding and unpaid on the August 15, 1956, assessment. (R. 19-20.)

On November 27, 1956, the appellant, Worley, gave to E. Floyd Hall the sum of $10,000, and accepted in return a promissory note payable to Worley in the face amount of $12,000 plus interest at the rate of ½ per cent per annum together with two written instruments executed by Hall as follows (R. 20-21):

November 27, 1956

I, E. Floyd Hall, DBA, Floyd's Wholesale House, hereby authorize Morthrift Finance Company, to include the name of A. V. Worley, except in the case of his death, to then include the name of Mrs. Dolly E. Worley, on all checks due and payable from my reserve account, until such time as the amount of $6,000.00 is paid.

Floyd's Wholesale House
/s/ By: E. FLOYD HALL

November 27, 1956

I, E. Floyd Hall, DBA: Floyd's Wholesale House, hereby authorize Pacific Finance Corpo-

ration, to include the name of A. V. Worley, except in the case of his death then to Mrs. Dolly E. Worley, on all checks due and payable from my reserve account, until such time as the sum of $6000.00 is paid.

Floyd's Wholesale House
/s/ By: E. FLOYD HALL

On October 25, 1957, E. Floyd Hall filed a voluntary petition in bankruptcy and subsequently was adjudged a bankrupt. The appellant, Worley, on November 14, 1957, filed a proof of claim with the bankruptcy court concerning his promissory note. In January, 1958, with the approval of the trustee in bankruptcy, Morthrift Finance Company paid $2,000 directly to the appellant Worley pursuant to the written instrument of November 27, 1956, pertaining to the reserve account maintained by the taxpayer with it. Thereafter, a procedure was worked out between the trustee in bankruptcy and the appellant's attorney whereby the funds which had accumulated in the dealer reserve accounts of Morthrift Finance Company and Pacific Finance Corporation were paid to the appellant and the trustee jointly. After the appellant endorsed these checks they were deposited in the trustee's account and the trustee procured a check in a like amount payable to the appellant, which checks were countersigned by the referee in bankruptcy. (R. 21.)

In accordance with this procedure, $5,830.89 was paid to the appellant from funds in the Pacific Finance Corporation reserve account and $3,788.87 was

paid to him from funds in the Morthrift Finance Company reserve. (R. 21.)

On the basis of the foregoing facts the District Court concluded as a matter of law, *inter alia,* that the federal tax liens of the United States were prior in time and superior in right to the interest of the appellant with respect to the two reserve accounts here in issue, and that a reserve account such as those involved in this case is not a "security", i.e., "money", within the meaning of Section 6323(c) of the Internal Revenue Code of 1954. (R. 22.) The correctness of the District Court's conclusions is demonstrated in its Memorandum and Order entered October 10, 1962. (R. 13-18.)

SUMMARY OF ARGUMENT

The United States acquired liens under the internal revenue statutes upon all property and rights to property of the delinquent taxpayer, including any interest he had in so-called reserves maintained by him with two named finance companies in connection with his business, which liens arose as of the dates on which delinquent taxes were assessed and continue in effect until the liability for such taxes is discharged or becomes unenforceable by reason of lapse of time. After notices of such liens were filed in accordance with the statute they also were valid against any mortgagee, pledgee, purchaser, or judgment creditor of the taxpayer except as to any mortgagee, pledgee,

or purchaser of securities, as defined by the statute, without notice of the federal tax lien.

Subsequent to the dates on which the federal tax liens herein arose and were recorded, the appellant, without actual notice of the federal tax liens, loaned the taxpayer $10,000 and accepted as security therefor two written instruments, substantially equivalent to assignments, each evidencing an interest in one of the reserves maintained by the taxpayer with the two finance companies. However, these so-called reserves were not "securities", as defined by the statute, excepted from the operation of the general lien statutes of the United States, and particularly they were not "money" as that term is used in the provision defining "securities" subject to the exception in the case of a mortgagee, pledgee, or purchaser, without notice of the federal tax lien.

Since the reserves in issue were not "securities" within the meaning of the statute the proceeds of such reserves paid to the appellant by the trustee in bankruptcy in liquidation of the taxpayer's estate were received subject to the superior liens of the United States for unpaid taxes, and the District Court properly entered judgment for the United States for the amount so received.

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT THE RESERVES MAINTAINED BY THE DELINQUENT TAXPAYER WITH TWO NAMED FINANCE COMPANIES WERE NOT "SECURITIES", I.E., "MONEY", WITHIN THE MEANING OF SECTION 6323(c) OF THE INTERNAL REVENUE CODE OF 1954

Upon failure or refusal of the delinquent taxpayer, after notice and demand, to pay the taxes assessed against him as detailed in the District Court's findings (R. 19-20), the amounts of such unpaid taxes, including any interest, additional amounts, additions to tax, assessable penalties, etc., became liens under Sections 6321 and 6322 of the Internal Revenue Code of 1954, *supra,* in favor of the United States upon all property and rights to property of the delinquent taxpayer as of the dates of the respective assessments, and continues as such liens until the liability for the unpaid taxes is satisfied or becomes unenforceable by reason of lapse of time. The liens in issue attached to all property and rights to property owned by the delinquent taxpayer at any time during the life of the liens,[1] and it has long been settled law that, once it has attached to property, "it is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere;* * * *." *Burton v. Smith,* 13 Pet. 464, 483. See, also, *Michigan v. United States,* 317 U.S. 338, 340; *United States v. Bess,* 357 U.S. 51, 57. However, Section 6323(a) of the 1954 Code, *supra,* provides that, except as otherwise provided in subsection (c) thereof,

[1] *Glass City Bank v. United States,* 326 U.S. 265; *Citizens Nat. Trust & S. Bank of Los Angeles v. United States,* 135 F. 2d 527 (C.A. 9th).

supra, the lien imposed by Section 6321 "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate" as provided therein. After notices of lien are filed pursuant to that section, however, liens of the United States for unpaid taxes are prior and superior to any subsequent interest claimed in any property of the delinquent taxpayer, except as provided in Section 6323(c).

Since this action was brought by the United States to foreclose its tax liens, the burden was upon the Government to establish valid liens under the statute against all property and rights to property of the delinquent taxpayer; that the reserves maintained by the taxpayer with the two named finance companies, whatever the nature of such reserves and whatever the taxpayer's interest in them, were "property" or "rights to property" held by the taxpayer to which such liens attached; that its liens were prior and superior to the appellant's claim against the reserves; and that the proceeds of such reserves passed to the appellant subject to the liens of the United States. The evidence clearly establishes and the appellant does not deny that the federal tax liens of the United States arose and were duly recorded prior to execution of the written instruments upon which the appellant relies; that the reserve accounts maintained by the taxpayer with the two named finance companies were "property" or "rights to property" held by the delinquent taxpayer to which the federal tax liens attached; and that the proceeds of such reserve

accounts passed to the appellant subject to the federal tax liens, unless, as contended by the appellant, he was a mortgagee, pledgee, or purchaser thereof without actual notice of such liens and the reserves constituted "securities" within the meaning of Section 6323(c) of the 1954 Code. This defense to the claim of the United States was raised by affirmative plea in the appellant's answer (R. 9-10), and the burden was upon him to establish that he is entitled to the benefit of Section 6323(c), which provides in paragraph (1) as follows:

> Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

This appellant was not a "purchaser" of the taxpayer's reserves within the meaning of the above subsection. He advanced $10,000 to the taxpayer for use in the latter's business (R. 41), taking in return the taxpayer's promissory note for $12,000 and the written instruments here in evidence—sometimes referred to herein as assignments for want of a better term (R. 20-21). These instruments did not constitute transfers of the taxpayer's interest in the reserves. They merely provided for the inclusion of the appel-

lant's name, or that of his wife in the event of his death, on all checks drawn by the respective finance companies in making payments from the reserves to the taxpayer until the sum of $6,000 had been paid from each reserve. The transactions clearly were security transactions only, and the Government accordingly does not contend that the appellant was not a "mortgagee" or "pledgee" within the meaning of the above subsection (c) (1). Nor does the Government contend that the appellant had actual notice of the recorded tax liens of the United States at the time he entered into the transactions of November 27, 1956.

We submit, however, that the evidence does not establish that the reserve accounts maintained by the taxpayer with the two named finance companies were "securities" within the meaning of the above provision of the statute, and that the District Court properly so held. Paragraph (2) of Section 6323(c) defining "securities" subject to the benefit of that subsection, reads as follows:

> (2) *Definition of security.*—As used in this subsection, the term "security" *means* any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase any of the foregoing; negotiable instrument; money. (Italics supplied.)

By using the word "means" in defining the term "securities" for purposes of this exception to the general lien provision, Congress intended that the exception should be restricted to the property or rights enumerated therein. Compare *Groman v. Commissioner,* 302 U.S. 82, 86; *United States v. Royce Shoe Co.,* 137 F. Supp. 786, 788 (N.H.). Moreover, this restricted definition of the term "securities" is in harmony with the evident purpose of Congress in providing the exception. See H. Rep. No. 855, 76th Cong., 1st Sess., pp. 25-26 (1939-2 Cum. Bull. 504, 523-524); S. Rep. No. 648, 76th Cong., 1st Sess., pp. 9-10 (1939-2 Cum. Bull. 524, 530-531).

The reserves maintained by the taxpayer with the two named finance companies clearly did not fall within any of the categories of written instruments or interests in property represented by such written instruments enumerated in the above definition of excepted "securities", and the appellant does not contend otherwise. On the contrary, his sole contention is that the reserves in issue were "money" as that term is used in Section 6323 (c) (2). (Br. 6.) Accordingly, whether the appellant has established that these particular reserves were "money" as that term is used in the statute is the narrow issue for determination here.

The appellant approaches this problem by first quoting excerpts from his own self-serving testimony given at the trial (Br. 7), and by quoting certain standard definitions of reserves and of the word "security" (Br. 9-10). However, this Court is concerned

only with the meaning of the term "money" as used in the statutory definition. "Money" is comprehensively defined in Webster's International Dictionary (Second Ed., Unabridged), as, *inter alia:*

> 1. Metal, as gold, silver, or copper, coined or stamped, and issued by recognized authority as a medium of exchange; coinage in general.
>
> * * *
>
> 3. Wealth reckoned in terms of money; capital considered as a cash asset; specif., such wealth or capital dealt in as a commodity to be loaned, invested, or the like; wealth considered as a cash asset; as, to make *money.*
>
> 4. Any particular form or denomination of coin or paper which is lawfully current as money;—now chiefly *pl.*
>
> 5. Anything customarily used as a medium of exchange and measure of value, as sheep, wampum, copper rings, quills of salt or of gold dust, shovel blades, etc.; hence, *Econ.,* anything having a conventional use either (1) as a medium of exchange or a measure of value, or (2) as a measure of value alone. In the latter case it is often called a *money of account,* and may be any arbitrary amount of property or wealth of any kind, as a flock of sheep of determined size, or a lac (100,000) of rupees.
>
> 6. Any written or stamped promise or certificate, such as a government note or bank note (often called paper money), which passes currently as a means of payment.

Black's Law Dictionary (Third Ed.), defines "Money" as:

> A general, indefinite term for the measure and representative of value; currency; the circulating medium; cash.
>
> "Money" is a generic term, and embraces every description of coin or bank-notes recognized by common consent as a representative of value in effecting exchanges of property or payment of debts. [Citation.]
>
> Money is used in a specific and also in a general and more comprehensive sense. In its specific sense, it means what is coined or stamped by public authority, and has its determinate value fixed by governments. In its more comprehensive and general sense, it means wealth,—the representative of commodities of all kinds, of lands, and of everything that can be transferred in commerce. [Citation.]
>
> In its strict technical sense, "money" means coined metal, usually gold or silver, upon which the government stamp has been impressed to indicate its value. In its more popular sense, "money" means any currency, tokens, bank-notes, or other circulating medium in general use as the representative of value. [Citations.]

2 Bouvier's Law Dictionary (Rawle's Third Rev.) pp. 2238-2239, defines money as "Gold and silver coins. The common medium of exchange in a civilized nation." That authority further explains Money:

> There is some difference of opinion as to the etymology of the word money; and writers do not agree as to its precise meaning. Some writers define it to be the common medium of exchange among civilized nations; but in the United States

> constitution there is a provision which has been supposed to make it synonymous with coins: "The congress shall have power to coin money." Art. I, sect. 8. Again: "No state shall coin money, or make anything but gold and silver a legal tender in payment of debt." Art. I, sect. 10. Hence the money of the United States consists of gold and silver coins. And so well has the congress maintained this point, that the copper coins heretofore struck, and the nickel cent of recent issues, although authorized to "pass current", are not money in an exact sense, because they are not made legal tender beyond twenty-five cents. The question has been made whether a paper currency can be constitutionally authorized by congress and constituted a legal tender in the payment of private debts. Such a power has been exercised and adjudged valid by the highest tribunal of several of the states, as well as by congress in the legal-tender acts of 1862 and 1863. * * *
>
> For many purposes, bank-notes; [citations]; treasury notes and national bank notes; [citations]; greenbacks; [citations]; a check; [citation]; negotiable notes; [citation]; securities; [citation]; and bonds; [citation]; will be considered as money. But, ordinarily, standing alone, it means only that which passes current as money, including bank deposits; * * *

It seems clear that dictionary and decisional definitions of "money" cannot be considered determinative of the purpose of Congress in using that term in Section 6323 (c) (2), and certainly such definitions of "reserve" or "reserve account" relied upon by the

appellant (Br. 7-9) are not helpful. The Supreme Court has heretofore held that the terms "purchaser"[2] and "judgment creditor"[3] are used in the federal tax lien statutes in their usual and generally understood sense,[4] and there is no reason to assume that Congress intended to use "money" in Section 6323 (c) (2) in a different sense. See *McCullough Tool Co. v. Commissioner,* 318 F. 2d 790, 794-795 (C.A. 9th). Money is the medium ordinarily used in the payment of debts and in the transaction of business. It would seem to be reasonable to treat the original transaction involved in this case as a loan of money to the taxpayer, although advanced in the form of a check, and although repaid in the form of checks. But we cannot believe Congress intended the term "money" as used in this statute to include rights or interests such as have been termed reserves in this case.

The appellant has revealed discouragingly little information regarding these so-called reserves. He testified that the taxpayer was in the automobile business (R. 41); he characterized the above written instruments of November 27, 1956, as assignments of reserve accounts with the finance companies (R. 36, 37, 38); that he went with the taxpayer to verify that he had reserve accounts with the finance companies (R. 38, 42); and "It's [the reserve] money being held

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[2]*United States v. Scovil,* 348 U.S. 218, 221.

[3]*United States v. Gilbert Associates,* 345 U.S. 361, 364.

[4]See, also, *United States v. Ball Construction Co.,* 355 U.S. 587, and *United States v. Pioneer American Ins. Co.,* 374 U.S. 84, involving mortgagees.

for repurchase of cars, et cetera, in the automobile business'' (R. 36). The record is silent as to the nature of the arrangement between the taxpayer and the finance companies under which these reserves were established or maintained. There is no evidence as to the amounts in these reserves at any time other than what can be surmised from the payments therefrom made to the appellant in the bankruptcy liquidation of the taxpayer's business. Nor is there any indication that the taxpayer had any right at the time of execution of these so-called assignments, or at any subsequent time prior to his bankruptcy, to withdraw any amount from either of these reserves.

This Court has had occasion to consider the nature of reserves maintained by other automobile dealers with finance companies in *Hansen v. Commissioner,* 258 F. 2d 585 (C.A. 9th), reversed, 360 U.S. 446; *Morgan v. Commissioner,* 277 F. 2d 152 (C.A. 9th); and *Shapiro v. Commissioner,* 295 F. 2d 306 (C.A. 9th), and in the absence of any showing to the contrary it would seem reasonable to assume that the reserves here in issue were of the same general character.

As stated above, we cannot believe that Congress intended the word ''money'' as used in Section 6323 (c) (2) to include interests or rights of the character reflected by such reserve accounts. It did not use the term ''money or money's worth'' as it did in paragraph (1) of that subsection, and there is nothing else in the statute or its legislative history to indicate that Congress intended to use the word as a measure

of value of interest in property. Since the restricted definition of "securities" otherwise enumerates all specific categories of interest or rights in property evidenced by written instruments which are excepted, and separately included negotiable instruments as excepted from the general lien provisions, it cannot be assumed that by using the word "money" Congress intended to extend the exception to other interests or rights in property. The instruments in question here (R. 11-12) are completely lacking in those elements of negotiability which Congress had in mind when it enacted this exception for securities. See H. Rep. No. 855, 76th Cong., 1st Sess., pp. 25-26 (1939-2 Cum. Bull. 504, 523, 524). Compare *Iron & Glass Dollar Savings Bank v. Siesal Construction Co.* (Ct. of Common Pleas, Allegheny County, Pa.), decided February 15, 1957 (52 A.F.T.R. 1474).[5] So far as the record here is concerned, the taxpayer had at most only an equity in reserves of undisclosed amounts on November 27, 1956, and such equity did not constitute either "securities" or "money" within the meaning of the applicable statute. Compare *Big Farm Tire Corp. v. Boland* (E.D. Va.), decided September 19, 1960 (6 A.F.T.R. 2d 5585).

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[5]*Bureau of Controlled Receivables v. United States* (S.D. Calif.), decided June 23, 1958 (2 A.F.T.R. 2d 5067), reached a different result, although the District Court there seems to have treated as "money" within the meaning of Section 6323 (c) (2) an amount becoming due the taxpayer after notice of the federal tax lien was filed and by the taxpayer assigned to the plaintiff in payment of an existing debt, whereas the assignment in the *Iron & Glass Dollar Savings Bank* case, *supra,* was given as security for a loan.

We find no decisional law to support this appellant's contention. *Bureau of Controlled Receivables v. United States* (S.D. Cailf.), decided June 23, 1958 (2 A.F.T.R. 2d 5067), cannot be considered even remotely analogous because the present record does not show that any amount credited to the so-called reserves was unconditionally due and owing to the taxpayer at the time of the transactions involved. In *United States v. Asher* (S.D. Calif.), decided June 14, 1954 (48 A.F.T.R. 1497), it was held that a judgment creditor, presumably without notice of a prior federal tax lien, could not acquire a superior right by levy upon a commercial checking account of the delinquent taxpayer because such an account is not a "security" within the meaning of the above statutory definition.[6] Other authorities relied upon by the District Court (R. 17-18), while not analogous, fully support its decision.

[6]Appellant's effort to distinguish the *Asher* case, *supra* (Br. 10), is based upon assumptions not shown by the record. It cannot be assumed that the so-called reserves represented money held for safekeeping and unconditionally subject to the taxpayer's command.

CONCLUSION

The decision of the District Court is right. It is supported by the facts and the law and should be affirmed.

Respectfully submitted,

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J. J. KILGARIFF,
Assistant United States Attorney.

November, 1963.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated, November 7, 1963.

CECIL F. POOLE,
United States Attorney

No. 18549

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL RIDDELL ELLIS,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF IDAHO

APPELLANT'S OPENING BRIEF

HONORABLE FRED M. TAYLOR,
United States District Judge

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Sylvan A. Jeppesen, U. S. District Attorney

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CASES

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- - -

EARL RIDDELL ELLIS,)
)
Appellant)
)
-vs-)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

Appeal from the United States District Court of the Eastern Division of Idaho

APPELLANT'S OPENING BRIEF

TO THE HONORABLE CHIEF JUDGE AND THE HONORABLE ASSOCIATE JUDGES OF THE ABOVE ENTITLED COURT:

JURISDICTION

This Honorable Court has jurisdiction of this cause by reason of a timely Appeal taken from judgment of Conviction on four counts charging violation of Title 18 USC Section 2314 by aiding and abetting the commission of the offense proscribed by this section and Under Title 18 USC. Section 2. Appellant was also convicted under a fifth count of

conspiracy to do the acts charged in the first four counts under Title 18 USC 371. This Honorable Court extended Appellant's time for filing Appellant's Opening Brief to May 10th, 1963 and the same has been timely served and filed within the extended time.

STATUTES INVOLVED

Title 18, USC Section 2314 which reads in pertinent part as follows:

> "* * *Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or
>
> * * *Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 18 USC Section 2 which reads as follows:

> "Principals
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
> (b) Whoever wilfully causes an act to be done which if directly performed by him would be an offense against the United States is also a principal and punishable as such."

Fifth Amendment to the Constitution of the United States, which reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the Constitution of the United States, which reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Rule 7 (c) Federal Rules of Criminal Procedure, which reads:

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 12 (b) (2) (3) Federal Rules of Criminal Procedure, which reads as follows:

(b) THE MOTION RAISING DEFENSES AND OBJECTIONS. (2) Defenses and objection based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense of objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) TIME OF MAKING MOTION. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Rule 27 Federal Rules of Criminal Procedure which reads as follows:

"An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

Rule 44, Federal Rules of Criminal Procedure which reads as follows:

"(a) AUTHENTICATION OF COPY. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied

with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivison in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

STATEMENT OF PLEADINGS AND MOTIONS.

The Appellant in this case was indicted by the Grand Jury on four counts charging violation of 18 USC 2314 and one count of conspiracy under 18 USC 371 in which it was charged that the acts complained of in the first four counts were done as a part of a conspiracy between the defendant and the Government's Chief witnesses thus constituting a fifth offense.

Each of the first four counts sets out in its first paragraph that on a certain date one Le Roy Simonson cashed a false and forged American Security Express Company Money Order in Idaho

drawn on the Pacific State Bank, Windsor Hills Branch, Los Angeles, California, thus placing a false or forced security in interstate commerce. The second paragraph implicates Appellant by alleging that he did feloniously aid and abet the commission of the crime charged in the first paragraph. The indictment, therefore charges the Appellant as a principal under 18 USC 2.

The fifth count charges the Appellant with conspiring with said Simonson and Simonson's wife Nettie Ellen to transport in interstate commerce the securities described in the first four counts. Six separate overt acts are alleged to have occurred pursuant to the conspiracy. The indictment is set forth Vol. I Transcript pp. 6-10

The Appellant moved to dismiss each count in the Indictment upon the grounds that the same did not conform to the requirements as required by the Constitution of the United States in Amendments V and VI thereof and failed likewise to show any facts whatever as to the means or methods used by the Appellant in aiding, abetting, counselling,

and procuring the commission of the alleged crime by Simonson as required by Rule 7 (c) and Rule 12 (b) (2) (3). As to count Five the Motion contained in addition to the above grounds. B. That the overt acts charged did not show any conspiracy combination or agreement to violate any Federal Law and C. That the value of the securities alleged to be the subject of the conspiracy was less than $5,000.00. Motion is set forth in full, Vol. I pp. 11-12 Transcript of Record.

At the time of the Arrignment on February 14th, 1962 the Appellant further filed a Demand for Bill of Particulars. Vol 1 p. 15. At the Arraignment the Court denied the Motion To Dismiss but did not rule on the Demand for Bill of Particulars until October 10, 1962, a few moments before the trial of the cause with the jury commenced. Vol 1 p. 89. Transcript.

At the time of the Arraignment February 14, Appellant pleaded "Not Guilty" to all five counts.

As a collateral matter prior to the trial and at the arraignment the Appellant had demanded the return of his books and records which had been taken by the Grand Jury. Vol I pp 16-23. His Motion and Demand were denied by the Court also just before the trial began on Oct 10, 1962, Transcript. p. 89. The Government was directed in open court to permit the

Appellant and Counsel to inspect these records "during the trial". These records were voluminous and the Order of the Court at this late date with all the pressure of the trial was inadequate, ineffective and useless to Appellant and his counsel. These records were important in the matter of fixing dates and establishing the defense of Appellant as will appear later herein.

STATEMENT OF FACTS

Appellant was convicted upon four counts of aiding, abetting, counseling, inducing, and procuring the unlawful transportation in interstate commerce of forged and falsely made securities and also upon a fifth count of conspiring with two other persons in the transportation of forged and falsely made securities in interstate commerce. (18 USC 2314 and 2) (18 USC 371).

The persons involved in the alleged conspiracy included LeRoy Simonson, Nettie Ellen Simonson, his wife, and the Appellant Earl Riddell Ellis. LeRoy Simonson previous to the time of the trial of the Appellant entered a plea of guilty to two counts of transporting in interstate commerce forged securities and was sentenced by the court. Nettie Ellen Simonson, his wife also previous to the time of trial of the Appellant entered a plea of guilty to one count

of transporting in interstate commerce forged securities, sentenced and placed on probation by the court.

The government primarily based the case against the Appellant upon the uncorroborated testimony of the previously mentioned co-conspirators and accomplices, whose stories were conflicting.

The conflicts between the stories told by Simonson and his wife are so many that it is only possible to call attention in this Brief to a few of the outstanding ones. For convenience of the Court and Counsel we have devised a table with references to the Transcript to show the impeached and incredible nature of the testimony upon which this conviction is based.

The Government's theory of the case at the trial was that Simonson and his wife came to Pocatello, Idaho, early in August of 1961. That they wanted to trade a 1954 Buick in for a better one at Appellant's Used Car Lot. That they discussed car trades and that Ellis told Simonson he would show him how to pay for a better car. That Ellis arranged for an apartment across the alley from his lot to rent to Simonson and then took Simonson for a ride to some point (not identified) in the vicinity

of Pocatello and that Appellant told Simonson to pick up a package which he says contained American Security Express Company Money Orders (Tr. Vol Two p. 20). They then returned to the Used Car Lot and to the apartment and Simonson displayed the package to his wife. Simonson then asserted that he wanted identification to assist him in cashing the money orders. He also stated that the parties agreed that they would divide the proceeds of the sale of the money orders. Simonson claimed that Ellis furnished to him an Idaho Liquor License made out to Demetrio Baca and which Simonson never used for any purpose. (Tran. Vol 2 pp. 24-25, Plaintiffs' Exhibit 1). Simonson had signed a contract for the purchase of a 1957 Buick Automobile and on the same day left for Ogden, Utah. There he obtained his own identification in the form of a Utah Liquor Permit under the name of Orville Davis and returned to Pocatello. An alleged conversation was had between Ellis, Simonson, and Mrs. Simonson about further identification and Simonson claimed that he received Army Discharge papers from Ellis for a man named Hugo Keller . Plaintiffs' Exhibit 2 was a completely unverified,uncertified copy of purported discharge papers of Hugo Keller allegedly on record in North Dakota. This highly prejudicial evidence

Was admitted by the Court over Appellant's strenuous objections. (Trans. Vol II pp. 30-32).

The Prosecution laid great store on a telegram (Exhibit #21) in which Simonson sent $300.00 from Grand Junction, Colorado, to Pocatello, Idaho as proof of the conspiracy but under the original contract for the purchase of the Buick by Simonson from Ellis, Simonson was required to make a $300.00 payment on August 15th, 1961. (Defendant's Ex. 16 Trans. Vol II pp 190-191) It is also to be noted that this contract was dated August 9th 1961, before Simonson left to cash money orders.

Simonson cashed money orders as described in the indictment and using his own false identification. Mrs. Simonson filled in the names of the fictitious parties (Keller, Davis etc.) after being "slapped around" by Simonson.

Simonson's testimony as to his life's history of felony convictions commences on p. 88 Vol II Transcript and continues to p.92. It starts with reform school in Oklahoma when he was in his teens for a year; Next he spent four years in the Colorado penitentiary; He is next found in the Idaho penitentiary on a conviction for burglary and served

eighteen months and then escaped. He was convicted of burglary in California and served a year at Folsom and then was returned to Idaho on the escape charge and served additional time in the Idaho penitentiary. He was allowed to plead "Guilty" on two counts and the others were dismissed, and he was convicted on the first two counts of the Indictment for the same violations charged against Appellant. Two other counts were dismissed. He was sentenced to serve three years to run concurrently. Mrs. Simonson pleaded "Guilty" to one charge not included in any of the counts against Appellant and was placed on Probation.

The Motives of Simonson and Mrs. Simonson in testifying against Appellant are shown by the testimony of William Booton and Douglas C. Johnson. The expectation of a lighter sentence for Simonson and probation for Mrs. Simonson stands out like a lighthouse beam in this case.

In regard to the use of ficticious automobile license plates and the conjecture as to who attached them to the automobile used by the Simonson's the Affidavit of Patrick Allison supporting the Motion for New Trial does clarify the question somewhat.

The testimony of William Booton and Douglas C. Johnson both cell mates of LeRoy Simonson during his incarceration in the County Jail at Pocatello, Idaho is to the effect that defendant was "framed" by the Simonsons for reasons of Simonson's prospect of leniency, prospect of leniency for Mrs. Simonson, possible resentment over the fact that defendant had withdrawn bond on the fugitive warrant for Mr. Simonson from Montana and possible resentment for defendant's failure to aid him.

Mr. Booton testified:

BY RICHARD BLACK:

Q. What did Simonson say?
A. He said he was going to get him.

Q. What did he say?
A. Over the bond, he was going to get him---over the bond.

Q. Did he say anything about Mr. Ellis' wife.
A. Yes. He figured she had turned him in to the FBI when Mr. Ellis was gone.
Trans. Vol 3. Ls 16-23 p. 364

The record also contains the testimony of Mr. Johnson regarding conversation between Mr. Simonson and his wife during his incarceration at Pocatello, Idaho.

THE WITNESS: Well, he wanted his wife to sign the statement that he had received the money orders from Earl Ellis and to tell the authorities that he got these orders in a card game they had at Earl's

house at one time. He didn't specify a date, and his wife seemed reluctant to do it. She cried a little and he pleaded with her to do it and said that if she didn't testify that was for him, it was possible that he was due for twenty years in prison from the Federal Government.

Trans. Vol 3 Ls 6-15 p.393.

SPECIFICATIONS OF ERROR

I.

The trial court erred in overruling Appellant's Motion to Dismiss the Indictment because all five counts are fatally defective in failing to state any facts as to how the Appellant participated in the Commission of the crimes charged.

II.

The trial court erred in failing to rule on the Demand for Bill of Particulars (filed on February 14, 1962 at the time of the arraignment) until a few moments before the trial commenced on October 10, 1962, and erred in denying Appellant the Bill of Particulars.

III.

The trial court erred and abused his discretion by failing to require the Respondent-United States to specify any facts or basis for the general conclusions stated in the indictment.

IV.

The trial court erred in refusing to return the books and records of Appellant to him in time to use them in the preparation of Appellant's case.

V.

The trial court erred in denying Appellant's Motion for an Acquittal at the close of the Respondent's Case.

VI.

The trial court erred in denying Appellant's Motion for an Acquittal at the close of all of the evidence.

VII.

The trial court erred in denying particularly the Motion for Acquittal as to Count Four because the evidence affirmatively showed that the offense could not possibly have been committed in the manner and at the time charged in that Count.

VIII.

The trial court erred in denying Appellant's Motion in Arrest of Judgment made on all of the grounds stated therein.

IX.

The court erred in overruling Appellant's Motion for New Trial.

X.

The court erred in admitting plaintiffs' Exhibit 2, which purported to be a photo-copy of discharge papers of one Hugo Keller on file in North Dakota. This Exhibit was not identified, certified, or authenticated. Transcript Vol Two pp.30-31. Counsel for Appellant made the following objection at pp.31-32.

> "MR. JOHN BLACK: If the court please, we object to this document on the ground that it is incompetent, errelevant, and immaterial and no proper foundation has been laid for its admission, and it doesn't appear to be a certified copy. It has no seal--nothing to show its verity in any way, shape, or form, and if it is a true copy of some document of record in the State of North Dakota it would have been a simple matter to obtain a Certified Copy.
>
> MR. BAKES: Our answer, Your Honor, having established that the original was destroyed this is the best evidence and the witness has identified it, and, therefore, I think that the foundation is laid for the admission of the document in evidence. The fact that it could have been certified---
>
> THE COURT: I don't want to hear anymore argument. I understand the problem.
>
> MR. JOHN BLACK: I want to add one more thing; it is not the best evidence available because it is not certified.

XI.

The court erred in failing to instruct the jury properly as to what consideration should be given to the testimony of accomplices in that

(a) In giving an instruction on accomplices (Trans. Vol IV. p. 482) the court used these words:

> "An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care."

(b) In failing to give Appellant's Requested Instructions numbered 1,4, and 5, on accomplices.

(c) In failing to give Appellant's Requested Instruction numbered 2, especially because the theory of the Appellant's Defense was that he merely sold a car to Simonson and knew Nothing of the money orders.

XII.

The court erred in imposing a much more severe sentence on Appellant than on either of the Simonsons in spite of previous criminal history of Simonson and no previous felony conviction of Appellant.

I.

The Fifth and Sixth Amendments to the Constitution of the United States require that no person shall be held to answer for a capital or otherwise infamous crime unless by indictment which shall inform such person of the nature and cause of the accusation

Constitution of the United States
Amendments Five and Six

II.

(a) The Federal Rules of Criminal Procedure require that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. Mere legal conclusions are not sufficient. This point applies to the entire indictment.

Rule 7 Federal Rules Criminal Procedure.

Current v. U. S. (CCA 9th 1961) 287 F(2) 268
Russell v. U. S. (1962) 369 U. S. 749 8L Ed (2) 240.

(b) It is not sufficient to charge an offense in the words of the statute creating it, unless such words themselves, without uncertainly, set forth all essential elements to constitute the crime intended to be punished.

U. S. v Simplot (DC Utah 1961) 192 F. Supp. 734

Russell v. U. S. (Supra) (U. S. Sup. Ct.1962)

Meer v. U.S. (CCA 10th) 235 F(2) 65

Wright v. U. S. CCA 6th) 243 F(2) 546

Ornelas v. U. S. CCA 9th) 236 F(2) 392

U. S. v Debrow (1953) 346 U.S. 374, 98 Led 92.

III.

The court for cause may direct the filing of a Bill of Particulars.

United States v Tornabene 222 Fed(2) 875

Clay v. United States 218 Fed (2) 483.

Current v. U. S. (CCA 9th) 1961 287 F(2) 268

Simpson v. U. S. CCA 9th 1960) 241 F(2) 222

IV.

It is no answer to a request for a Bill of Particulars for the government to say:

"The defendant knows what he did and therefore has all the information necessary."

Since the defendant is presumed to be innocent he is presumed to be ignorant of the facts on which the charges are based.

Russell v. U. S. (1962) 369 U. S. 749
8 L. Ed (2) 240

Cooper v. U.S. (CCA 9th 1960) 282 F(2) 527

Rodella v. U. S. (CCA 9th 1960) 286 F(2) 306

U. S. v Smith D.C. Mo 1954 16 FRD 372

U. S. v. Grieco D. C. N.Y. 1960 25 FRD. 58

Thomas v. U. S. 1 CCA 8th 1951 188 F(2) 6.

U. S. v Baker Brush Co.(DC N.Y 1961)197 F. Supp 922.

U. S. v. Bentvena (DC N.Y. 1960) 193 F. Supp 485

U. S. v. Strauss (CCA 5th) 283 F (2) 155

V.

It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.

Russell v. U. S. 8 L. Ed (2) 240 (Advance Sheet)

U.S. v. Cruikshank 92 U.S. 542 23 L.Ed 588,593

An indictment not framed to appraise the defendant "with reasonable certainty", of the nature of the accusation against him is defective although it may follow the language of the statute.

Russell v. U.S. 8 L.Ed (2) 240

U. S. v. Simmons 96 U.S.360 24 L.Ed 819

U.S. v. Carll 105 U.S. 611 26 L Ed 1135.

Hernandez v. U.S. 300 F(2) 114 (9th 1962)

VI.

It was error for the Court to refuse to refuse to allow Appellant access to his books and

records except during the trial.

Rule 16. Federal Rules of Criminal Procedure

VII

Rule 27 of the Rules of Criminal Procedure by reference adopts Civil Rule 44. Rule 44 requires proper authentication of documents by the legal custodian of the record. Plaintiffs' Exhibit 2 was admitted without complying with any requirements as to identification or authentication and was highly prejudicial.

Rule 27 Federal Rules of Criminal Procedure

Rule 44 Federal Rules of Civil Procedure

Passantino v. U.S. (CCA 8th) 32 Fed (2) 116

Mullican v. U.S. 252 Fed (2) 398

Wright v. MCDonald (MO) 233 SW(2) 19

Schuyler v. United Air Lines 94 F. Supp 472

The appellant did not have a fair trial for all the reasons mentioned above and in addition was based upon the uncorroborated testimony of accomplices, who were otherwise impeached and discredited.

McLendon v. U.S. (CCA MO) 19 Fed (2) 465

Sykes v. U.S. 20 Fed 909

Ambrose v. U.S. 280 Fed (2) 766

Ardett v. U.S. 265 Fed (2) 837

Claypole v. U.S. 280 Fed (2) 768

Caminetti v. U.S. 242 U.S. 470, 495, 61 L Ed 442.

Holmgren v. U.S. 217 U.S. 509 54 L.Ed 861

VIII.

Where the trial court has imposed an excessive sentence, the Court of Appeals has jurisdiction to modify the same. This is particularly true when contrasted with lighter sentences imposed on hardened criminals involved in the same offense.

U.S. v. Wiley (CCA 7th 1960) 278 Fed (2) 500

Yales v. U.S. 356 U. S. 363 2 L.Ed (2) 837
89 ALR 295 , 29 ALR 313.

SUMMARY OF ARGUMENT

This Argument may be summarized briefly in the following points.

I.

INDICTMENT FATALLY DEFECTIVE

The indictment and all five counts should have been dismissed on Motion timely filed for failure to comply with the minimum requirements of the Constitution of the United States and with Rule 7 of the Federal Rules of Criminal Procedure. The error of the trial court in denying the Motion to Dismiss, Motion for Acquittal at close of Government's case, Motion for Acquittal at the close of all the evidence and Motion in Arrest of Judgment as covered in various ways by Specifications of Error numbered I, V, VI, VII, VIII, and IX.

II.

DEMAND FOR BILL OF PARTICULARS

The Appellant's Demand for a Bill of Particulars should in any event have been granted because the Appellant was not advised by the Indictment as to how, when, where, or in what way he was charged to have aided and abetted, the commission of the crimes with which he was charged. Appellant was presumed by law to be innocent of the charges made and hence to be ignorant of the circumstances constituting the

offense. Specifications of Error numbered II and III are directed against the Court's refusal to require the Respondent to state the facts. It is not sufficient to charge an offense in the words of the statute creating it, unless such words themselves without certainty, set forth all essential elements to constitute the crime intended to be punished. An indictment not framed to appraise the defendant "with reasonable certainty" of the nature of the accusation against him is defective even though it follows the language of the statute.

III.

ERRORS BEFORE AND AT TRIAL CONCERNING EVIDENCE

(a) It was prejudicial error to deprive the appellant of access to his books and records prior to the trial. Specification of Error number IV.

(b) It was highly prejudicial to admit in evidence Plaintiffs Exhibit 2 which purported to be a photocopy of discharge papers of one Hugo Keller supposedly on file in North Dakota. This exhibit had no identification, authentication, verity, or probity whatever but was introduced by Respondent and relied upon as a strong circumstance against Appellant during the trial and especially during Argument of Counsel. Specification of Error numbered X.

(c) The Court failed to strongly instruct the jury as to the caution and distrust with which to regard the testimony of accomplices LeRoy Simonson and Nettie Ellen Simonson especially in view of the conflicts, inconsistencies, and unreliability of their testimony as given and the impeachment of LeRoy Simonson. The testimony of these witnesses when taken together is so incredible as to destroy belief and is at best a most fragile platform upon which to base a conviction and long term of imprisonment for the Appellant together with a heavy fine.

IV.

EXCESSIVE SENTENCE

It is the contention of the Appellant that if all of the evidence of the Simonsons and the Respondent is taken as true for the purpose of this Argument (which we by no means concede), the Appellant as convicted had the least to do with the commission of the crimes charged. Yet because he pleaded "Not Guilty" and stood trial he was sentenced to the most severe sentence of all the defendants. His defense was not frivolous and he has maintained his innocence throughout at the expense of the loss of all of his possessions and his final descent into bankruptcy during the pendency of this appeal. He had no previous record of convictions and an excellent record in the service of his country including an

Honorable Discharge from the service. He had been in business for many years in Pocatello, Idaho. He was sentenced to five years imprisonment and to pay a fine of $1000.00 on each of the five counts upon which he was convicted. By comparison, Nettie Ellen Simonson was placed on probation. LeRoy Simonson was shown by his own testimony to have been convicted of felonies at least four times and to have spent a great portion of his adult life confined in prison, ranging through Oklahoma, Colorado, Idaho and California. He was sentenced to three year

This Court has jurisdiction to correct this unequal and excessive sentence.

CONCLUSION

These convictions of Appellant, then, in the humble opinion of Counsel for Appellant should be reversed for the following reasons.

1. The Indictments were fatally defective.

2. The Demand for a Bill of Particulars should not have been denied.

3. The Court committed prejudicial error:

   (a) In depriving appellant of his books and records.

   (b) In admitting in Evidence Plaintiffs Exhibit 2.

   (c) In failing to impress upon the jury the unreliability and lack of probity of the accomplice testimony.

4. The sentence imposed by the trial judge was excessive and severe especially when compared

In this case, it might be said by way of opening, that it got off on the wrong foot from the start.

Simonsons were indicted, plead "Guilty" and were sentenced. In the meantime, the Grand Jury indicted Appellant herein for aiding and abetting the Simonsons on the same counts under 18 USC 2. The manner in which these counts were phrased is best illustrated for the convenience of Court and Counsel by setting out Count One in full from the Indictment.

Count One
(Vio. 18 USC 2314)

That on or about August 10, 1961, in the Eastern Division of the District of Idaho, LeRoy Mackay Simonson, with unlawful and fraudulent intent did transport or cause to be transported in interstate commerce from Malad City, Idaho, to Los Angeles, California, a forged and falsely made security, to-wit, an American Security Express Company Money Order, No. 292453, dated July 28, 1961, drawn on the Pacific State Bank, Windsor Hills Branch, Los Angeles, California, payable to Hugo Keller, in the sum of $45.00, signed Carl Keller as maker thereof and endorsed with the name Hugo Keller, and that the said LeRoy Mackay Simonson then knew that the signature of Carl Keller and the signature of Hugo Keller were

each falsely made and forged on said money order.

And the Grand Jury further charges:

That at the time and place first above mentioned, the defendant, EARL RIDDELL ELLIS wilfully knowingly and feloniously did aid, abet, counsel, induce and procure the commission of the above-described offense; this also in violation of Section 2314, Title 18, United States Code.

Trans. Vol I p.6 (Underlining ours)

It is at once to be observed that the pleader has used the exact words of the statute to charge the offense except he has added "wilfully, knowingly and feloniously".

Counts Two, Three and Four are essentially the same so far as pleading is concerned and hence we will treat them all the same for the purposes of this argument.

The Indictment was filed February 9, 1962 and the Appellant was brought before the Court on February 13, 1962 and filed his Motion to Dismiss all Counts in the Indictment for failure to comply with the minimum requirements of the Constitution of the United States Amendments Five and Six and Rule 7 of Federal Rules of Criminal Procedure.(Tr.Vol I p.11)

The Motion to Dismiss pointed out that no offense was charged against Appellant for the reason

"the offense is alleged to have been committed by others than the defendant but no allegations of fact are made as to how or in what manner, or when with certainty the defendant did aid, abet, counsel, induce and procure the commission of the alleged crime". The Motion to Dismiss was denied on February 14th, 1962. (Tr.Vol 1 p 27)

Thereafter the Appellant complained about this Indictment every chance that he had as we will point out herein.

We have in this Brief set out the Fifth and Sixth Amendments to the U. S. Constitution. See pgs. 2 and 3 this Brief. We refer to the Fifth Amendment because one of the tests of the sufficiency of an indictment is whether or not it is specific enough to prevent a second indictment for the same offense.

We rely on the Sixth Amendment to the Constitution because it requires that an accused has the right "to be informed of the nature and cause of the accusation.

Appellant further relies upon Rule 7 (c) of the Federal Rules of Criminal Procedure because it provides in its first sentence (p.3 this Brief) as follows:

> "The indictment or the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

From a reading of the representative Count set forth above it is at once apparent that the entire paragraph dealing with Appellant does not state one fact from which Appellant could be advised of what the charge against him might be from a fact standpoint. The pleader and the indictment have been limited to nothing but legal conclusions.

It is impossible to determine from the indictment:

1. How the Appellant aided Simonson.
2. What the Appellant did to abet Simonson.
3. What the Appellant did to counsel or induce or procure the commission of Simonson's crime.

Not one essential fact is pleaded to show how Appellant in any way "aided", or "abetted" or "counselled", or "induced", or "procured" the commission of Simonson's crime.

Not one fact is alleged as to what the Appellant is supposed to have done.

This Honorable Court has recognized and approved the rule requiring Compliance with Rule 7 (c).

Current v. U.S. (CCA 9th 1961)287 F (2) 268.

Likewise the Supreme Court of the United States in the recent case of Russell v. U.S.(May 1962) 369 U.S. 749 8 L Ed (2) 240 had this to say:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,--it must descend to particulars.' "
United States v. Cruikshank, 92 US 542, 558 23 L ed 588, 593.

An indictment not framed to apprise the defendant "with reasonable certainty of the nature of the accusation against him. . . is defective, although it may follow the language of the statute."
United States v. Simmons, 96 US 369, 362 24 L ed 819, 820.

"In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . ."
United States v Carll, 105 US 611, 612, 26 L ed 1135.

"Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description with which he is charged."
United States v Hess, 124 US 483, 487, 31 L ed 516, 518, 8 S Ct 571.

See also Pettibone v United States, 148 US 197, 202-204, 37 L ed 419, 422, 423, 13 S Ct 542;
Blitz v United States, 153 US 308, 315, 38 L ed 725, 727, 14 S Ct 924;
Keck v United States, 172 US 434, 437, 43 L ed 505, 507, 19 S Ct 254;
Morissette v United States, 342 US 246, 270 Note 30, 96 L ed 288, 304, 72 S Ct 240.
Cf. United States v Petrillo, 332 US 1, 10, 11, 91 L ed 1877, 1884, 1885, 67 S Ct 1538.

That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.

attention to the following decisions.

Meer v. U. S. (CCA 10th) 235 F(2) 65

Wright v U.S. (CCA 6th) 243 F. (2) 546

Ornelas v U.S. (CCA 9th) 236 F(2) 392

U. S. v. Debrow (1953) 346 U.S. 374 98 L ed 92

With respect to the fifth count in the indictment the charge is made that the Defendant-Appellant conspired with LeRoy Simonson and Nettie Ellen Simonson to do all the acts charged in the first four counts. Obviously, if the first four counts do not satisfy the requirements of the Sixth Amendment to the Constitution and Rule 7 (c) then the fifth count also fails to state any offense.

We believe that the above authorities and the rule set out in U.S. v. Strauss (CCA 5th 1960) 283 F (2) 155. support the proposition that count Five of the indictment failed to state an offense.

Footnote 6. on p 158 of the opinion reads as follows:

> "The mere charge that the acts done in connection with the conspiracy were in violation of the said statute. . . is not sufficient where, as here, the facts alleged fail to support such a charge which amounts to nothing more than the statement of a legal conclusion."

See also
U. S. v Cruikshank 92 US 542 23 L ed 588

Pettibone v U.S. 148 US 197 37 L ed 419

U. S. v Waddell 112 US 76 28 L ed 673

Pierce v U. S 252 US 239 64 L. Ed 542

II.

DEMAND FOR BILL OF PARTICULARS

The argument for a Bill of Particulars in this case is fundamentally based on the same ground as the Motion to Dismiss. We are well aware of the fact that if the Motion to Dismiss was well-taken there would be no basis for a Bill of Particulars. Our argument here is in the alternative and without concession to the Motion to Dismiss. This Motion was denied on February 14th 1962 and the Appellant immediately filed a Demand for a Bill of Particulars. He was striving in every way possible to ascertain the nature of the case against him so that he could prepare his defense.

The record shows that this Demand was not treated lightly by the trial judge in the first instance. He did not rule on it until October 10th 1962 a few moments before the trial commenced. (Tr. Vol I p. 89). At that time he denied it.

Appellant's counsel believe that if it can be said that the indictment can stand, then surely Appellant was entitled to a Bill of Particulars. When the charges of an indictment are so general as to fail to sufficiently advise the accused of the specific acts with which he is charged, the trial court has the power to order a Bill of Particulars under Rule 7 (f) of Federal Rules of Criminal Procedure.

From Appellants Memorandum Brief filed with the District Court on October 8th, 1962. (Tr Vol I pp. 77-84)the desperation of the Appellant and his counsel is apparent. They were about to go to trial and were not in possession of a single fact to show how it would be contended that Appellant actually violated the law. He was charged only with a series of legal conclusions. He had no answers to the questions of "how" "what", or in what manner he would be called upon to defend.

It cannot be disputed or argued that the Court had the power to order the Bill of Particulars.

U. S. v Tornabene 222 F (2) 875

Clay v U. S. 218 F (2) 483

U. S. v Debrow 346 US 374 98 L ed 92

Current v U. S. (CCA 9th 1961) 287 F(2) 268

Simpson v U. S. (CCA 9th 1960) 241 F(2) 222

It is no answer to a request for a bill of particulars for the Government to say that the defendant knows what he did and therefore has all the information necessary. The defendant is presumed to be innocent throughout all stages of the trial until proven "guilty" beyond a reasonable doubt. Therefore, he must be presumed to ignorant of the facts on which the charges are based BEFORE TRIAL.

Russell v U. S. (1962) 369 US 749 8 L ed (2)240

Cooper v U. S. (CCA 9th 1960)282 F(2) 527

Rodella v U. S. (CCA 9th 1960) 286 F(2) 306

U. S. v Smith (DC Mo 1954) 16 FRD 372

U. S. v Grieco (DC Ny 1960) 25 FRD 58

Thomas v U. S. (CCA 8th 1951) 188 F(2) 6

U. S. v Baker Brush Co. (DC Ny 1961) 197 F. Supp 922.

U. S. v Bentvena (DC Ny 1960) 1960) 193 F. Supp 435.

U. S. v Strauss (CCA 5th) 283 F(2) 155.

It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species or the particular character of the act.

"Generic" means general in application: Comprehending large classes: or having a large scope.

The terms "aid", "abet", "counsel" "induce" and "procure" are "generic" by their very nature. A moment's reflection for example on any of these words can produce a wide variety of imaginary applications.

The use of such words in an indictment can lend no "reasonable certainty" to the charge.

III.

ERRORS BEFORE AND AT THE TRIAL CONCERNING EVIDENCE

(a) It was highly prejudicial to the defense of this action to deprive the Appellant of access to

his books and records before the trial. From the record it appears that these books and records of Appellant were subpoenaed by a duces tecum served on witness Elmer Tarr December 26, 1961, by the Grand Jury. (Tr. Vol I p.34). Tarr by affidavit asserted a proprietary interest in records kept after December 1, 1961 (Tr Vol I pp. 37-38) George F. Zeal Deputy U. S. Marshall for the District of Idaho asserts by affidavit that upon instructions from Tarr, one Walter Dubble brought the records and documents in question to his office in Pocatello for safe-keeping and that he later surrendered them to Vernon Jensen a special agent of the Federal Bureau of Investigation for delivery to the U. S. Attorney in Boise. (Tr. Vol I pp. 35-36).

Appellant moved for the return of said books and records (Tr Vol I p. 16); supported by Appellant's Affidavit (Tr Vol I pp 17-23) including attached correspondence. The Motion was made on February 14th 1962. The Court denied the Motion a few moments before trial on October 10th 1962 with a provision that Appellant and Counsel might look at the records during the trial. (Tr Vol I p. 89).

This action on the part of the Court effectively prevented the Appellant from any efficient use of these voluminous records in preparing for trial. The records and documents included in the subpoena included:

1. Oak card file and all cards located in it.

2. Sales Tickets executed during the year 1961.

3. The original contract of sale of a 1957 Buick Sedan to LeRoy M. Simonson dated August 9th, 1962.

But all of the books and records of City Auto Sales were delivered to Mr. Zeal and Appellant has never received them yet at the time of the filing of this Brief.

We feel that this prevented the Appellant from having a fair trial and was in violation of Rule 16 Federal Rules of Criminal Procedure.

(b) The Appellant strongly objected to the admission in evidence of Plaintiff's Exhibit 2 which purported to be a photocopy of a record in North Dakota of the discharge papers of one Hugo Keller. The proceedings in connection with the identification and the foundation laid for admission of the Exhibit appear in the Transcript Vol Two pp.30-31. The Exhibit was objected to by Appellant on the specific grounds set forth in Specification of Error Number X of this Brief at page 16 hereof. It was objected to because it had no verity or probity whatever. It was not even certified.

Rule 44 of the Federal Rules of Civil Procedure is adopted by Rule 27 of the Federal Rules of Criminal Procedure as the standard for proof of documents and the Authentication thereof. For the convenience of the Court and Counsel this Rule is

set forth on pp.4-5 of this Brief.

An examination of the Exhibit and the record of its identification, authentication, and admission in evidence over the objection of the Appellant (Tr Vol II pp. 30-31)will show that it was error to admit this Exhibit.

It was also highly prejedicial in view the testimony of Simonson as to the use of the name "Hugo Keller" for identification in cashing the money orders and his assertion that he received the original discharge papers from Ellis and later destroyed them.

Passantino v U. S. (CCA 8th) 32 F (2) 116

Mullican v U. S. 252 F (2) 398

Wright v McDonald (Mo) 233 SW (2) 19

Schuyler v United Air Lines 94 F. Supp 472

In the Mullican case the Court held that copies of official records and documents cannot be properly admitted in evidence without substantial compliance with statute and rules and there was no such substantial compliance where certificate failed to show that copies, from which photo copies had been made were of themselves official documents or that they were true copies of originals and did not recite that individual purporting to authenticate photocopies had custody of ori inal documents or that he had official duties in political sub-division where records copied were kept.

(c) The Appellant did not have a fair trial for the reasons stated in (a) and (b) above and particularly where the conviction rested almost entirely on the uncorroborated testimony of two accomplices. The testimony of the accomplices was replete with conflicts, and inconsistencies. It was impeached by the numerous prior felony convictions of LeRoy M. Simonson. Tr Vol II pp.88-92. For the comparison of a few of the inconsistencies in the testimony of the accomplices please see Appendix I attached hereto in table form.

In view of their incredible story we feel that the Court should have instructed the Jury in the strongest language to distrust their testimony and to use the greatest of caution in considering it.

We are mindful of the rule in the Ninth Circuit as to there being no requirement for the corroboration of the testimony of an accomplice and which was so recently reiterated and approved in Toles v. U. S. No 17, 682 filed October 9 1962; Williams v U. S. No 17979 filed October 3, 1962; and White v U. S. which we understand was filed in the last few days.

We are also mindful of the older precedents which we have referred to under Point VII p. 21 of this Brief.

We do not wish to be disrespectful to the Court in any way in urging that in this case under all the circumstances a different rule might apply when taken into consideration with all of the other surrounding circumstances and the whole record of this trial.

This Court in considering an Appeal from Alaska (while still a Territory) under a statute requiring that the testimony of an accomplice be corroborated had no difficulty in sustaining such salutary rule in Stephenson v U. S. 211 F(2) 702 and in Ing v U. S. 278 F(2) 362.

In the Stephenson case the Court said:

> The Alaska statue to the effect that evidence of an accomplice is to be viewed with distrust was the question. The trial court failed to give an instruction on this point holding that defendant was not an accomplice of the Government's chief witness. This was held to be reversible error.
>
> The Court said: The logic and reasoning contained in the cases in jurisdictions following the minority rule has consideration appeal in view of the similar broad definition of "principals" contained in Sec. 2, Title 18 US Code, but under the circumstances of this case we find it unnecessary to rely thereon. The facts in the instant case bring it squarely within the exception to the general rule. The evidence, if true, was sufficient to show the existence of a conspiracy between witness Tester and appellant to commit the crimes of larceny and the receipt of stolen property, and thus fix the status of Tester as that of an accomplice so as to require the giving of cautionary instruction by the trial court. Tester's testimony came from a tainted source and was the character of evidence Congress considered unreliable and sought to protect against by Sec. 58-5-1. ACLA 1949 2.

The Court did not give an instruction as required by said Sec. 58-5-1, ACLA 1949, nor did appellant request such an instruction or except to the failure of the Court to so instruct. In a prosecution for violation of a law of the United States we held that under Alaskan law it was mandatory on the District Court to instruct as to the manner in which a jury should view the testimony of an accomplice. Anderson v United States, 9 Cir, 1946, 157 F(2) 429. Subsequent to the trial of the Anderson case, supra, Congress adopted the Federal Rules of Criminal Procedure, 18 USCA, and made them applicable in Alaska. Appellee argues that the Federal Rules of Criminal Procedure repealed Sec. 58-5-1 ACLA 1949. That section was enacted by Congress in 1900 and governs criminal trials in the Territory of Alaska. 31 Stat 438-439 (1900). Section 23, Title 48 USCA, provides in part that ". . . all laws in force in Alaska, prior to (August 24, 1912) shall continue in full force and effect until altered, amended, or repealed by Congress or by the (territorial)legislature." Section 58-5-1, ACLA 1949 has not been expressly altered, amended or repealed by either Congress or the territorial legislature. Nor do we find support for the argument that said section was impliedly altered, repealed or amended by the Federal Rules of Criminal Procedure.

We find no reference in said rules to the giving of cautionary instructions as to an accomplice's testimony. On the contrary the Alaska statute, requiring such an instruction is wholly consistent therewith and deals with a subject outside the scope and coverage of the Federal Rules of Criminal Procedure. In addition, the Federal Rules of Criminal Procedure seem to require the trial court to comply with the Alaska Statute.

The requirements of Sec. 58-5-1, ACLA 1949 being still in force and effect in criminal trials in Alaska, the case of Anderson v United States, 9 Cir, 1946, 157 F(2) 429, is controlling here. Under the circumstances of this case, the failure of the Court to give the accomplice testimony instruction is such plain error as to impel us to notice it under the provisions of Rule 52(b).,

Federal Rules of Criminal Procedure Title 18 USCA. From a reading of the whole record it affirmatively appears that such failure was highly prejudicial to appellant. Bihn v. United States 1946, 328 US 633, 66 S CT 1172, 90 L ed1485. The Government's case rested almost entirely upon the testimony of accomplice Tester, the thief. The jury should have had the benefit of the instruction in order to enable them to properly evaluate that testimony.

In the cited cases, this Court has pointed out all of the reasons in right and justice for the Application of the rule requiring corroboration of the testimony of an accomplice.

We respectfully hope that under the unusual circumstances of this case the application of the precedented rule might be modified.

IV.

EXCESSIVE SENTENCE

Appellant is aware of the precedent for upholding sentences in the federal court if within the limits of the penalties imposed by Congress in the statutes.

However, in this case, we have the unusual situation wherein three persons were charged with participation in the same offense. Each received a different sentence. Nettie Ellen Simonson, with no previous record, was placed on probation by the Court. As the wife of Simonson she was drugged with alcohol and beaten into participation in the crimes with which Simonson was charged. The District

Attorney even asked for leniency in her case although this fact does not appear in this record.

On the other hand Simonson who cashed the money orders and received the proceeds was sentenced to serve three years concurrently in a federal penitentiary on the counts to which he pleaded "guilty". His was a long and tawdry history of crime commencing in his youth and continuing over his entire adult life. At the time he was sentenced he was 57 years of age and through four felony convictions had shown no inclination to reform or to be rehabilitated.

The Appellant up until the time of his conviction in this case had never been convicted of a felony. He had honorably served his country in World War II and received an honorable discharge. He was a businessman in Pocatello, Idaho. Under these circumstances he was sentenced to serve 5 years in a federal penitentiary concurrently on all five counts and required to pay a fine of $5000.00 $1000.00 on each count.

The Court specifically required the Appellant to pay this fine before he could obtain bail pending this appeal. (Tr. Vol I p. 115) also in(Court minutes p. 114).

Appellant was unable to understand this sentence in any other light than that he was being penalized for having defended himself against the charges in the indictment.

This brings this case squarely within the authority of this Court to modify this sentence. Yates v U. S. 356 US 363 2 L ed (2) 837. U. S. v. Wiley (CCA 7th 1960)

In the Wiley case, the Court said:

> "Nor can the disparity in sentences imposed here be justified on the ground that Wiley asked for a trial. As we said in our former opinion, 267 F 2d at page 456:
> "* * * the defense certainly was not frivolous nor does it appear to have been presented in bad faith."
> Our part in the administration of federal justice requires that we reject the theory that person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted."

CONCLUSION

For the reasons set out herein we believe that the convictions of Appellant should be reversed. The reasons briefly stated being:

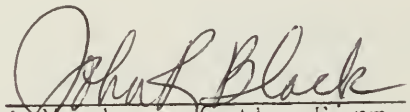
> 1. The indictments were fatally defective because they failed to comply with the minimum requirements of the Sixth Amendment and Rule 7 of the Federal Rules of Criminal Procedure. Each and every one of the Counts stated mere legal conclusions and no facts to apprise the appellant of the charges against him. In the absence of pleading any facts, the presumption of innocence also presumes the

accused ignorant of the circumstances stated in the charge.

2. In view of the denial of the Motion to Dismiss by the Court, the Bill of Particulars should have been allowed to at least define the generic terms and words used in the indictment. Accused was entitled to know what facts or circumstances were charged against him with some degree of certainty.

Respectfully Submitted,

BLACK & BLACK



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APPENDIX I

The following is a brief summary and reference to several of the discrepancies, inconsistencies and outright conflicts in the testimony of LeRoy Simonson compared with his wife's testimony.

NETTIE ELLEN SIMONSON	LEROY SIMONSON
She testified in substance as follows:	He testified in substance as follows:
1. Vol.3 p249-251 Simonsons came from Three Forks, Montana to Pocatello, Idaho. via Butte Montana. They came straight through from Butte with stops for drinks only. No fishing.	1. Tr.Vol 3 p.98 That they fished and camped out over one or two nights on the trip from Montana to Idaho.
2. That she never heard any conversation between Appellant and her husband that Appellant would finance the trip. Tr Vol 3 p 260	2. That the Appellant stated he would finance the trip in the amount of $500.00. Tr. Vol2 pp 17 & 107
3. That when Appellant and Simonson went for a ride to obtain securities she remained in the office at car lot. Tr.Vol 3 p.257	3.That when Appellant and Simonson left for a ride to obtain securities Mrs. Simonson went to the house to lie down and rest.Tr. Vol 2 pp.19-20
4.That they stayed at a hotel the first night on arrival in Idaho. Tr.Vol 3.p253	4. That Simonsons went directly to Appellant's car lot on arrival in Pocatello, Idaho. Tr. Vol 2 p. 100

5.Appellant furnished liquor permit for identification only. Tr. Vol 3 p 262 & 269	5. Appellant furnished liquor permit and discharge papers of Keller. Tr.Vol 2 p112-115

IN THE

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For the Ninth Circuit

No. 18549

EARL RIDDELL ELLIS,

Appellant

— vs. —

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF IDAHO

BRIEF FOR THE APPELLEE UNITED STATES

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United States District Judge

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ATTORNEYS FOR RESPONDENT

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF IDAHO

BRIEF FOR THE APPELLEE UNITED STATES

STATEMENT OF PLEADINGS AND MOTIONS

1. Grand Jury Indictment based upon Title 18, U.S.C., Sections 2314, 371 and 2. Clerk's Transcript, page 6-10.
2. Motion to Dismiss based upon the Sixth Amendment, United States Constitution, Rule 7(c) and Rule 12(b) (2) (3), Federal Rules of Criminal Procedure. Clerk's Transcript, page 11-12.
3. Demand for Bill of Particulars based upon Rule 7(f), Federal Rules of Civil Procedure. Clerk's Transcript, page 15.
4. Motion (to return books and records) based upon Rule 16, Federal Rules of Criminal Procedure. Clerk's Transcript, page 16.

STATEMENT OF FACTS

Certain of the facts contained in appellant's statement of facts are controverted by the jury's verdict of guilty, and therefore the following resume' of the facts is presented.

On the second or third of August, 1961, LeRoy Simonson and his wife Nettie Ellen Simonson came to Pocatello from the State of Montana and went to the used car lot operated by the defendant Ellis for the purpose of trading in their 1954 Buick automobile for an automobile in better working condition. Mr. Simonson had known the defendant Ellis previously. (Vol. 1, reporter's transcript, pages 14-17). The defendant Ellis interested Mr. Simonson in a 1957 Buick automobile which was beyond his means to own, and used this for a basis to suggest to Mr. Simonson that he could pay for the car by cashing certain money orders and splitting the money with defendant Ellis. (Vol. 1, reporter's transcript, pages 17-18). After some time, Mr. Simonson agreed to this plan. It took Mrs. Simonson considerable more time and alcohol before she would go along with the scheme. (Vol. II, reporter's transcript, pages 206, 267). The Simonsons agreed to try the 1957 Buick while they were out on their check-cashing venture, because their first attempt to make a check-cashing trip in their own 1954 Buick was a failure because the 1954 Buick broke down. Prior to leaving with the 1957 Buick, Mr. Simonson signed a contract of sale form in blank for the express purpose of protecting the defendant Ellis in case of an accident or a pickup. (Vol. 1, reporter's transcript, pages 40-41).

While on a trip with this car, Mr. Simonson sent the defendant Ellis a $300.00 Western Union money

order from Grand Junction, Colorado, as the defendant Ellis' share of the proceeds of money orders cashed up to that point. (Vol. 1, reporter's transcript, pages 66-67). Upon return from this check-cashing trip, on or about August 21, 1961, Mr. Simonson was arrested on a fugitive warrant and by arrangement of the defendant Ellis, he was represented by the attorneys Black and Black, who represent the appellant in this action, and was bonded out of jail. (Vol. 1, reporter's transcript, pages 153-157; Vol. II, pages 231-247). The Simonsons immediately left the Idaho area in their 1954 Buick which they had brought from Montana and continued cashing the checks throughout the western part of the United States, although the defendant Ellis had instructed them to destroy the remaining checks because they were too hot. (Vol. II, reporter's transcript, page 229). Changing automobiles twice while on this last trip, the Simonsons returned to Idaho in October of 1961 and were immediately arrested by Federal authorities for passing the money orders. (Vol. II, reporter's transcript, pages 240-245; Vol. I, pages 80-83).

While represented by Black and Black, attorneys for the appellant herein, the Simonsons entered a plea of guilty to an information charging them with interstate transportation of the stolen money orders, and in December, 1961, Mr. Simonson was sentenced to three years in prison, and Mrs. Simonson was given a probation period. (Vol. II, reporter's transcript, pages 245-246).

The defendant Ellis denied throughout the trial any connection with the scheme of cashing money orders, and maintained that the $300.00 money

order was payment on the 1957 Buick automobile. To support this defense, the defendant Ellis presented at the trial defendant's Exhibit 16, which was the contract of sale which Mr. Simonson stated he signed in blank. At that time, the defendant's Exhibit 16 was filled in in full, and purported to be a contract of sale of the 1957 automobile to Mr. Simonson, in which transaction the 1954 Buick, bearing the Montana license plates, and which the Simonsons had driven to Pocatello from Montana, was taken in on trade. (Vol. III, reporter's transcript, pages 418-421). The witness Elmer Tarr, who was the bookkeeper and associate of the defendant Ellis in the City Auto Sales lot, testified, contrary to the defendant Ellis, that he had filled in the contract, defendant's Exhibit 16, and that when he received it, it had been signed in blank. That the terms of the contract were dictated by the defendant Ellis sometime after it had been signed by Mr. Simonson. (Vol. I, reporter's transcript, pages 176-182).

The record further discloses that at no time was the 1954 Buick which the Simonsons had brought from Montana traded in as the contract, defendant's Exhibit 16, indicated, and when the Simonsons left Pocatello on or about August 31, 1961, after Mr. Simonson had been bonded out of jail by Mr. Ellis, they left Pocatello in their own 1954 Buick with the Montana license plates. The entire record discloses, as apparently the jury found, that in fact there was no sale of the 1957 Buick automobile to the Simonsons, and that the contract of sale, defendant's exhibit 16, was just what the defendant Ellis told Mr. Simonson it was for, that is, a cover up in case of an accident or a pickup. (Vol. 1, reporter's transcript, pages 40-41).

Upon instructions of their attorneys Black and Black, the Simonsons made a full statement to the Federal authorities, (Vol. 1, reporter's transcript, page 153) and were subpoenaed before the Federal Grand Jury which resulted in the indictment of the defendant Ellis for the charge of aiding, abetting, counseling, and procuring the commission of the crime which the Simonsons had committed.

POINTS AND AUTHORITIES AND SUMMARY OF ARGUMENT

I

An indictment charging the soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, need not state the particulars of the incitement or solicitation, or of the aid or assistance.

Coffin v. *United States*, 156 U.S. 432;
Daniels v. *United States*, 17 F.2d 339 (CA 9, 1927;)
United States v. *Quinn*, 111 F. Supp. 870 (E.D. N.Y. 1953);
United States v. *Ike Nelson*, 273 F.2d 459 (CA 7, 1960);
Hale v. *United States*, 25 F.2d 430 (CA 9, 1928).

II

The motion for a bill of particulars is addressed to the sound discretion of the trial court, and the trial court's ruling thereon will not be disturbed in the absence of an abuse of that discretion.

Cooper v. United States, 282 F.2d 527, 532, (CA 9, 1960);
Nye & Nissen v. *United States*, 168 F.2d 846 (CA 9, 1948);

Schino v. *United States*, 209 F.2d 67, 69 (CA 9, 1953);
Kobey v. *United States*, 208 F.2d 583, 592 (CA 9, 1953).

III

Even when the District Court has abused its discretion, unless the record discloses some evidence of surprise or prejudice, a conviction should not be reversed.

Williams v. *United States*, 289 F.2d 598 (CA 9, 1961);
Sartain v. *United States*, 303 F.2d 859 (CA 9, 1962).

IV

The motion for new trial is addressed to the sound discretion of the trial court.

Prlia v. *United States*, 279 F.2d 407 (CA 9, 1960);
Perez v. *United States*, 297 F.2d 648 (CA 9, 1961).

V

A motion for production and inspection of books and records under Rule 16 requires a showing that the items sought may be material to the preparation of the defense.

Rule 16, Federal Rules of Criminal Procedure.

VI

Where an original document has been destroyed, a photographic copy is admissable where a sufficient foundation is laid disclosing that the photographic copy is a true copy of the original.

Jones on Evidence, 5th Ed., Vol. 1, Sec. 237, 238 and 266; *Fidelity and Deposit Company of*

Maryland v. *Union Trust Co. of Rochester*, 129 F.2d 1006 (CA 2, 1942);

Western, Inc. v. *United States*, 234 F.2d 211 (CA 8, 1956).

VII

The uncorroborated testimony of an accomplice, if believed by a jury, is sufficient basis to justify a conviction.

United States v. Bible, 314 F.2d 106 (CA 9, 1963);

United States v. *Toles*, 308 F.2d 590 (CA 9, 1962);

United States v. *Williams*, 308 F.2d 664 (CA 9, 1962).

VIII

Where the sentence imposed upon conviction is within the limits fixed by law, it is within the discretion of the trial court and will not be disturbed upon appeal in the absence of an abuse of that discretion.

Berg v. *United States*, 176 F.2d 122 (CA 9, 1949) cert. den. 338 U.S. 876, 70 S.Ct. 137, 94 L.Ed. 537;

Hayes v. *United States*, 238 F.2d 318 (CA 10, 1956) cert. den. 353 U.S. 983, 77 S.Ct. 1280, 1 L.Ed. 2nd 1142;

United States v. *Gottfried*, 165 F.2d 360, cert. den. 333 U.S. 860, 68 S.Ct. 738, 92 L.Ed. 1139;

Bell v. *United States*, 100 F.2d 474 (CA 5, 1938);

United States v. *Hoffman*, 137 F.2d 416 (CA 2, 1943).

ARGUMENT

Appellant having failed to file with the Clerk of this Court and serve upon the adverse party, a con-

cise statement of points upon which he intended to rely, as provided in Rule 17(6) and Rule 10 of the Rules of the United States Court of Appeals for the Ninth Circuit, and appellee not being advised by the Clerk of the Court regarding the disposition of its alternative motion to compel appellant to so file and serve the points upon which he intended to rely, or in the alternative to dismiss the appeal, appellee will base its argument upon the specifications as they are described on page 14 through 17 of the appellant's brief.

The first specification of error set out in appellant's brief is that the trial court erred in overruling appellant's motion to dismiss the indictment. For the purposes of illustration, appellant sets out on page 27 of his brief Count One of the indictment. Appellant does not question the fact that the first paragraph of Count One describes with requisite particularity the offense of passing the money orders, but contends that the second paragraph is not sufficient to tie the appellant with the crime specifically charged in the first paragraph. The second paragraph reads as follows:

> "And the Grand Jury further charges:
> "That at the time and place first above mentioned, the defendant, Earl Riddell Ellis, willfully, knowingly and feloniously did aid, abet, counsel, induce and procure the commission of the above described offense; this also in violation of Section 2314, Title 18, United States Code."

In his brief appellant has collected a number of cases which state the general proposition that it is not sufficient to charge the violation of a statute in the language of the statute unless those words of them-

selves fully, directly and expressly, without any uncertainty or ambiguity set forth all of the elements necessary to constitute the offense intended to be punished. However, none of the cases cited by appellant in his brief interpret or are concerned with the proper manner of pleading "aiding and abetting" as that crime is charged in Title 18, U.S.C., Section 2.

An examination of the decisions will show that the Supreme Court of the United States has ruled that the words, "aid, abet, counsel, induce and procure", are not ambiguous, or "generic", as contended by counsel, but are specific statements of fact, and in and of themselves constitute a particular charge of facts. Thus, in *Coffin* v. *United States*, 156 U.S. 432, 448, the Supreme Court stated:

> "Nor is the contention sound that the particular act by which the aiding and abetting was consummated must be specifically set out. The general rule upon this subject is stated in United States v. Simmons, 96 U.S. 360, 363, as follows: 'Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement. It is laid down as a general rule that "in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance' " * * *"

The courts of appeals have uniformly followed this decision as well they must. *Daniels* v. *United States*, 17 F.2d 339 (CA 9, 1927); *United States* v. *Quinn*, 111 F. Supp. 870 (E.D. N.Y., 1953); *United States*

v. *Ike Nelson*, 273 F.2d 459 (CA 7, 1960). As stated in *Hale* v. *United States*, 25 F.2d 430 (CA 8, 1928):

> "The next point urged is that the indictment is insufficient to support a judgment of conviction insofar as this plaintiff in error is concerned. The grounds stated are that it does not set forth the offense with such clearness and certainty as to apprise the accused, as an abettor, of the crime with which he stands charged; that it does not furnish the accused with such a description as would enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution, that it does not inform the court of the facts alleged with sufficient definiteness and certainty to enable the court to decide whether or not those facts are sufficient in law to support a conviction — in other words, that it does not inform plaintiff in error 'how or in what manner he aided Ramsey, nor how he abetted him, or counseled or commanded or procured him to do the deed in question.'
>
> "The indictment, after setting out with requisite particularity the acts of John Ramsey, who committed the murder, charges plaintiff in error in the following language:
>
> > " 'That William K. Hale, a white person, late of the said district, then and there unlawfully, feloniously, willfully, deliberately, maliciously, and premeditatedly, and with malice aforethought on his part, did aid, abet, counsel, command, and procure the said John Ramsey in so doing and so to do.'
>
> "This method of charging one who aids or abets

> in the commission of a crime has been authoritatively approved. In *Coffin* v. *United States*, 156 U.S. 432, 448, 15 S.Ct. 394, 400 (39 L.Ed. 481), the court said: 'Nor is the contention sound that the particular act by which the aiding and abetting was consummated must be specifically set out. The general rule upon this subject is stated in *United States* v. *Simmons*, 96 U.S. 360, 363 (24 L.Ed. 819), as follows: "Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement." ' "

Appellant's further argument (appellant's brief, p. 32) that "obviously, if the first four counts do not satisfy the requirements of the Sixth Amendment of the Constitution and Rule 7(c), then the fifth count also fails to state any offense," is a *non sequitur*. Additionally, it does not state the law as shown by the following quotation from *Wong Tai* v. *United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 71 L.Ed. 545 (1926), wherein the Supreme Court stated:

> "It is well settled that in an indictment for conspiring to commit an offense — in which the conspiracy is the gist of crime — it is not necessary to allege with technical precision all of the elements essential to the commission of the offense which is the object of the conspiracy, *Williamson* v. *United States*, 207 U.S. 425, 447, or to state such object with the detail which would be required in an indictment for committing the substantive offense,***(citing cases). In charging such a conspiracy 'certainty to a common intent, sufficient to identify the of-

fense which the defendants conspired to commit, is all that is necessary.' "

Count Five of the present indictment not only describes a conspiracy with a "certainty to a common intent, sufficient to identify the offense which the two defendants conspired to commit," but in addition, incorporates by reference the allegations of fact in the first four counts of the indictment which describe in detail how the conspiracy was consummated. Viewed in this light, Count Five was more than adequate.

Williamson v. *United States*, 310 F.2d 192 (CA 9, 1962);

Toliver v. *United States*, 224 F.2d 742 (CA 9, 1955);

Rubio v. *United States*, 22 F.2d 766 (CA 9, 1927).

Actually, appellant could have been charged as a principal in each of the counts of this indictment, even though the proof would have shown that he procured and caused the commission of the crime in violation of Title 18, Sec. 2. *Nye & Nissen, et al* v. *United States*, 168 F.2d 846 (CA 9, 1948); *United States* v. *Decker*, 51 F. Supp. 20, affirmed 140 F.2d 375 (CA 4, 1944), cert. den. 321 U.S. 792, 64 S.Ct. 791, 88 L.Ed. 1082; *Melling v. United States*, 25 F.2d 92 (CA 7, 1928).

And, since the first paragraph of each of the four counts of the indictment in this case describes the crime committed with requisite particularity, appellant can hardly complain that he has been prejudiced by the fact that the indictment additionally advised him that the evidence would show that he aided, abetted, procured and caused the commission of the crime.

The appellant's second and third assignments of error concerns the refusal of the trial court to grant his motion for bill of particulars. The only question before this court at this time is whether or not the district court abused its discretion in so denying, because as stated many times, "the motion for a bill of particulars is addressed to the sound discretion of the trial court and the trial court's ruling thereon should not be disturbed in the absence of an abuse of that discretion." *Cooper* v. *United States*, 282 F.2d 527, 532 (CA 9, 1960); *Nye & Nissen* v. *United States*, 168 F.2d 846 (CA 9, 1948); *Schino* v. *United States*, 209 F.2d 67, (CA 9, 1953); *Kobey* v. *United States*, 208 F.2d 583, 592 (CA 9, 1953)."

It is generally stated by all courts that "a bill of particulars is to define more specifically the offense charged and does not function as a device through which a defendant can secure evidentiary details upon which the government will rely at trial." *United States* v. *Grado*, 154 F. Supp. 878, 881 (W.D. Mo., 1957); *Steffler* v. *United States*, 143 F.2d 772 (CA 7, 1944); *Cefalu* v. *United States*, 234 F.2d 522 (CA 10, 1956).

It has been held that where a person is charged with aiding and abetting the commission of a crime which is particularly described in the indictment, such as done in the first paragraph of Count One through Count Four in this case, no bill of particulars will lie to obtain additional evidence of the aiding, abetting and procuring. *United States* v. *Steinberg, et al*, 48 F. Supp. 182 (DC Mass., 1942); *Coffin v. United States*, 156 U.S. 432.

The rule of the *Steinberg* case seems reasonable since as described on page 12 of this brief, appellant

could have been charged as a principal, even though the proof would have shown him to have procured the commission of a crime, thus being an accessory as described in Title 18, Sec. 2. Appellant does not question that the first paragraph of each of Counts One through Four describes the crime with requisite particularity, appellant's objection being that the second paragraph which describes appellant as aiding and abetting and procuring the commission of the offense described in the first paragraph does not tell him how, where, who, and when he aided, abetted, caused and procured the commission of the offense. If appellant had been charged as a principal in the first paragraph, no bill of particulars would lie. It hardly seems reasonable that to further advise him that the proof will show that he aided, abetted, caused and procured the commission of the offense could prejudice him. *Nye & Nissen* v. *United States*. 168 F.2d 846 (CA 9, 1948).

Assuming the request for particulars had been such that the trial court should have granted it, this court has held that "in the absence of some evidence or surprise, as evinced perhaps by a defendant's motion for a continuance, the discretion of the trial court should not be disturbed." *Williams* v. *United States*, 289 F.2d 598 (CA 9, 1961); *Sartain* v. *United States*, 303 F.2d 859 (CA 9, 1962).

In the case now before the court the record not only discloses a lack of prejudice or surprise, but on the contrary shows that the appellant knew exactly what the evidence to be produced against him would be, and prepared a comprehensive and detailed defense to meet that evidence. (Vol. III, reporter's transcript, pages 405-448).

The Government's witnesses who the defendant was alleged to have aided and abetted, were produced by the Government and were cross-examined at extreme length by the defendant's counsel. There was no withholding of witnesses or names as in *Roviaro* v. *United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957). Compare, *Sartain* v. *United States*, 303 F.2d 859 (CA 9, 1962).

The entire transaction concerning the defendant Ellis causing and procuring and aiding and abetting the Simonsons in passing the money orders resulted from the initial desire on the part of the Simonsons to purchase a car from the defendant Ellis. The defendant Ellis had interested them in a car which was beyond their means to pay for, and it was in this manner that the defendant Ellis sugested to Mr. Simonson that he could pay for the car by cashing the money orders which he subsequently delivered to them. The Simonsons took the car, a 1957 Buick, which at that time they had not yet purchased, and went out on a venture of cashing these checks. While on the trip they forwarded by Western Union money order the amount of $300.00 to the defendant Ellis as his share of the proceeds in cashing the checks, using the fictitious name of Orville Daves. This transmission of money was set out as overt act No. 6 in the indictment. Thus, from the time of the filing of the indictment, the defendant Ellis was aware of the fact that he would be required to explain the receipt by him of the $300.00 money order from one Orville Daves. In explanation of this, he produced at the trial the original of an alleged contract of sale of the 1957 automobile to Simonson. (Defendant's Exhibit No. 16) The terms of the alleged sale called for $300.00 monthly payments, and his explanation

of the receipt of the $300.00 was that it was merely a monthly payment which he thought had come from Simonson's brother-in-law. (Vol. III, reporter's transcript, pages 423, 445). However, the witness Mr. Simonson testified that the contract was signed in blank. (Vol. 1, reporter's transcript, pages 40 and 41). The witness Elmer Tarr testified that the contract had been handed to him sometime after the Simonsons had taken the car by the defendant Ellis, and that the contract was in blank except for Mr. Simonson's signature. (Vol. 1, reporter's transcript, page 176). Witness Tarr testified that defendant Ellis instructed him to fill in the contract and that the particulars of the transaction were furnished by the defendant Ellis. (Vol. 1, reporter's transcript, page 176). The witness Tarr further testified that it was the practice of the defendant Ellis to loan cars and have contracts signed in blank. The witness testified that the defendant Ellis told him that it would be protection in case anything happened. (Vol. 1, reporter's transcript, pages 181 and 182). The entire transaction concerning defendant's Exhibit No. 16, the alleged sale of the 1957 Buick to the Simonsons, was such that the jury was justified in disbelieving it, and this left the defendant Ellis with no explanation of his receipt of the $300.00 money order, other than that given by the witness Simonson, that it was his share from the sale of the money orders. (Vol. 1, transcript, pages 66 and 67).

The detail with which the appellant's defense and alibi fit into the Government's evidence clearly indicates the lack of surprise which that evidence had upon the appellant. cf. *Sartain* v. *United States*, 303 F.2d 859 (CA 9, 1962).

Probably the most compelling reason why there is no evidence of surprise or prejudice in the failure to grant the bill of particulars was that counsel for the appellant was probably more familiar with the particulars than counsel for the Government. When the Simonsons were arrested defendant Ellis arranged for their representation by the attorneys Black and Black, who are here representing him. (Vol. II, reporter's transcript, page 231, 247; Vol. I, pages 153-157) The record discloses that the Simonsons entered pleas of guilty to the charges based upon the advice and recommendations of their attorneys Black and Black. (Vol. II, reporter's transcript, pages 245-246) Having represented the Simonsons in this matter, prior to the time that the charge against the defendant Ellis was presented to the Grand Jury, they, as attorneys for the Simonsons, and here as attorneys for defendant Ellis, were particularly in command of all of the facts concerning the transaction. This knowledge on behalf of the attorneys for the defendant Ellis is clearly disclosed by the cross-examination of Mr. Simonson, Vol. 1, Reporter's Transcript, page 153:

"Q. When did you first make any statement to any Government officer concerning this case?

A. The only statement I ever made concerning this case was here in Pocatello in the jail down there when Mr. Black there was my counsel and instructed me to come clean with it. It was his recommendation that I do it.

Q. Mr. Black was not present when you made the statement, was he?

A. Yes, sir; Richard Black.

Q. He was not present when you made the statement?

A. No, sir, but he was present when he told my wife and I.
Q. He told you to tell the truth?
A. Yes, tell the truth and come clean."

(later at page 157)

Q. Mr. Simonson, isn't it a fact that the reason you decided you were going to put Mr. Ellis on the spot was to save yourself a twenty-year sentence?
A. I put Mr. Ellis on the spot from the instructions of Mr. Richard Black, my attorney. I refused to make a statement until I was instructed by my counsel as to what to do."

In reviewing cases on appeal from a conviction, this court has stated:

"It is the function of this court in reviewing a record such as this, after a verdict of guilty, to take the view of the evidence which is most favorable to the appellee. We are required to accept as true all facts which are reasonably shown by the evidence." *Davenport* v. *United States*, 260 F.2d 591 (CA 9, 1958), cert. den. 359 U.S. 909, 79 S.Ct. 585, 3 L.Ed. 2d 573; *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *United States* v. *Nelson*, 273 F.2d 459 (CA 7, 1960); *Remmer* v. *United States*, 205 F.2d 277 (CA 9, 1953); *Schino* v. *United States*, 209 F.2d 67 (CA 9, 1954)

In view of the rule of law stated in the above authorities, and in view of the testimony of Mr. Simonson, and the circumstances surrounding Mr. Simonson's representation by Black and Black, the appellant's attorneys herein, it is "reasonably shown", as stated in the Davenport case, that the appellant, through his counsel, was fully aware of the entire

transaction, and the entire particulars of the Government's evidence, long before the trial. In fact, appellant's counsel was aware of this evidence prior to the time that the evidence was called to the attention of the Government investigators. With this knowledge, there could be no surprise or prejudice to the defendant. This no doubt explains why the defendant was able to produce such a comprehensive and intricate defense at the trial of the case, and why there was no motion for continuance at the end of the Government's case in order to properly meet the evidence which had been produced.

One other factor indicates the lack of prejudice to the defendant in formulating his defense. After the conclusion of the trial, the defendant made a motion for a new trial and a motion to enlarge the time for making a showing in support of his motion for a new trial. (Vol. 1, clerk's transcript, page 103) The hearing on this motion was set for December 3, at 9:00 o'clock a.m. At the time of the hearing on December 3rd, the defendant had had fifty-one days from the conclusion of the trial in order to obtain and present any new evidence which he might otherwise have presented except for the alleged surprise resulting from refusal to grant the motion for bill of particulars. The only showing made at that time was the filing of an affidavit of one Patrick J. Allison. Assuming the matters set out in his affidavit to be true, its only effect was to tend to impeach the testimony of Mr. Simonson and Elmer Tarr. Again, assuming the contents of the affidavit were true, the impeaching nature of this alleged testimony of Patrick J. Allison was available had the witness been interviewed, and therefore the granting or the denial of the motion for bill of particulars would not have

had any effect upon the availability of this alleged testimony for the appellant.

This affidavit deserves some additional comment. It was taken on November 30, 1962 (Vol. 1, clerk's transcript, page 112), although it was not filed and served on counsel for the United States until the very morning of the hearing, (Vol. 1, clerk's transcript, page 111), and then only as the Judge was ascending the bench to hear the motion, a move well calculated to prevent any counter showing. Before Counsel for the United States had an opportunity to obtain the necessary information for a counter showing, the defendant's motion for a new trial had been denied, the defendant was sentenced, and the notice of appeal filed, on behalf of the defendant, all on the same day, (Vol. 1, clerk's transcript, page 116), thus removing any further jurisdiction in the matter from the District Court. As a result, the United States was prevented from bringing in the original records of the Bannock County Sheriff's Office, showing the manner in which the witness Patrick J. Allison was booked upon arrival there, and was further prevented from submitting to the District Court the original signed statement given by Patrick J. Allison to the Federal Bureau of Investigation, which statement was the basis for the United States going to such extreme lengths to require the attendance of this witness at the trial for purposes of possible rebuttal. Although it would be improper at this point to attempt to go outside of the record and bring in the matters which the Government could have shown in opposition to the facts alleged in the affidavit of Patrick J. Allison, it can be reasonably assumed that had the Government not had a statement from this witness contrary to that set out in the

affidavit, it would not have used the extreme method of a warrant of arrest as a material witness in order to assure his presence for rebuttal purposes at the trial, if needed. (Clerk's transcript, Vol. I, pages 85-87)

In any event, the motion for new trial is addressed to the sound discretion of the trial court, and under all the circumstances there appears to be no abuse of that discretion here. *Prlia* v. *United States*, 279 F.2d 407 (CA 9, 1960).

As stated in *Perez* v. *United States*, 297 F.2d 648 (CA 9, 1961), at page 648:

> "The proposed new evidence was an attempt to impeach the identifying witness, Lira. It all 'existed' prior to the trial. There was no showing of due diligence in seeking it. *Prlia* v. *United States*, 9 Cir. 1960, 279 F.2d 407, 408; *Pitts* v. *United States*, 9 Cir. 1959, 263 F.2d 808, cert. den. 360 U.S. 919, 79 S.Ct. 1438, 3 L.Ed. 2d 1535. The trial judge carefully considered the motion for a new trial, and rejected the worth of the 'newly discovered evidence'. It is Hornbook law that this court cannot second-guess a trier of fact who has heard the testimony, scrutinized the witnesses, and noted their demeanor and behavior on the witness stand (*Jeffries* v. *United States*, 9 Cir. 1954, 215 F.2d 225, 226; *United States* v. *Johnson*, 1946, 327 U.S. 106, 112, 66 S.Ct. 464, 90 L.Ed. 562), and had the opportunity, both at the trial and on motion for a new trial, to place his reliance on those whom *he* believes to have been telling the truth."

Appellant alleges as the fourth specification of error (appellant's brief, page 15) that the failure

to grant his motion to deliver the books and records which had been subpoenaed from Elmer Tarr before the Grand Jury was prejudicial error. However, an examination of the record discloses that at no time prior to the trial did the defendant ever suggest that the books and records were necessary for the preparation of his defense. The original motion for the production of the books and records which the defendant filed on February 14, 1963, does not state that the books and records are necessary for his defense, but on the contrary states:

> "That the restoration of these books and records to the affiant is important and necessary in the conduct of his business as City Auto Sales for the purpose of preparing tax returns, collecting accounts receivable and otherwise carrying on the business known as City Auto Sales;" Clerk's transcript, Vol. 1, page 18.

The record also discloses that at that time the United States disclaimed any further interest in the books and records, and stood ready to turn them over to the person from whom they were subpoenaed, or to such other person as the court would direct. (Clerk's transcript, Vol. 1, pages 31-33; supplemental reporter's transcript, page 21, 23). The record further discloses that the person from whom the United States had obtained the records pursuant to subpoena, Elmer Tarr, was making demand upon the United States for the return of said documents, claiming a proprietary interest in said documents, and the right to immediate possession thereof. (Clerk's transcript, Vol. 1, pages 37-38).

The supplemental reporter's transcript at page 9 discloses that at the time of the filing of the motion

for the production of books and records on February 14, 1963, appellant's counsel stated:

> "Mr. John Black: The reason we have to have the books is stated in the last paragraph, they are needed in the operation of the business and whatever purpose they could serve has been done and they are not legally in the custody of the United States Marshal."

Actually, the first time that the matter of the use of the books and records in the appellant's defense was ever brought up was on October 10, 1962, the morning of the day the jury was selected, and then it was not by the appellant or his counsel, but by the District Judge who suggested that if the defendant wanted to examine the books for the purpose of the trial the court would make them available to the defendant. The supplemental reporter's transcript, page 22-23, discloses the following proceedings:

> "The Court: I remember the incident coming up. I don't think in this proceedings, Mr. Black, that the court is in a position to litigate who is entitled to the records. If the records are of some importance to the defense of this case, the defendant should be able to see the records and have them here.
>
> "Mr. Bakes: The records are in the Marshal's office and will be made available.
>
> "The Court: That is all you want?
>
> "Mr. John Black: Yes sir."

In addition, appellant's entire argument that it was error not to turn the records over to him is based upon an assumption that the appellant was entitled to the books and records. However, the record discloses that there was a conflict over who was entitled

to the records, Elmer Tarr or the defendant Ellis, and, therefore, the appellant not having proved that he was entitled to the records, can certainly not claim error in failing to turn the records over.

Appellant cites Rule 16 of the Federal Rules of Criminal Procedure in support of his motion to obtain the books and records. Rule 16 provides:

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

This rule contemplates a showing on behalf of the defendant that the records are necessary for the preparation of the trial. Here the defendant not only made no showing that they were necessary, but did not even suggest that he was requesting them for that purpose until after the District Judge offered to make them available for that purpose on October 10, 1962.

As ordered by the court, the books and records were available to the defendant during the trial, and the defendant prepared and presented a rather comprehensive defense. The defendant made no showing

of surprise, nor requested any continuance to further examine the books and present more evidence. After the trial, the defendant made a motion for a new trial requesting a period of sixty days within which to present new evidence in this matter, and there was no showing of any new evidence discovered from the books and records, or from any other source. The record discloses neither error nor prejudice.

Appellant's tenth assignment of error concerns the admission into evidence of plaintiff's Exhibit No. 2. Appellant's objection seems to be that the copy was not the best evidence because it was not certified. However, whether or not a document is certified is not the test of whether or not it is the best evidence. The general rule is that the original document is the best evidence and unless the original is postively shown to have been unavailable or destroyed, no copy is admissable. As stated in Jones on Evidence, Fifth Edition, Vol. 1, Sec. 237:

> "Since the best evidence rule requires proof of the content of a writing by the writing itself it must necessarily follow in order to prevent miscarriages of justice, that the content of the writing may be proved by other means where the writing itself is unavailable, or for some other legitimate reason it is not possible or feasible to produce it. The situations generally recognized as justifying failure to produce the original writing and resort to secondary evidence instead, treated separately in the succeeding sections, are: loss or destruction, * * *."

However, the eidence here discloses positively that the witness Simonson tore up the original discharge papers and "flushed them down". In Vol. 1, pages

30-31 of the reporter's transcript of evidence the following questions and answers appear:

"Q. Handing you what has been marked as Plaintiff's Exhibit No. 2 for identification, I will ask you to state whether or not you can recgnize that document?
A. This is not the original.
Q. I will ask you whether or not you recognize the document?
A. I recognize it as a copy.
Q. A copy of what?
A. Of the discharge papers.
Q. To which you have testified?
A. With the name of Hugo Keller I used.
Q. This is a copy of the discharge paper which you testified that the defendant furnished you at that time?
A. I would say yes.
Q. What happened to the original of the discharge paper?
A. I destroyed them after cashing the money orders. I tore it up, the wallet and the Social Security card and I tore them up and flushed them down.
Q. Is it your testimony whether or not this is a photographic copy of the discharge papers that the defendant handed you at that time?
A. I would say yes."

With the foregoing foundation having been laid, the photographic copy of the discharge papers was the best evidence available, and was properly admitted. Jones on Evidence, 5th Ed., Vol. 1, Sec. 237, 238, and 266; *Fidelity and Deposit Company of Maryland* v. *Union Trust Company of Rochester*,

New York, 129 F.2d 1006 (CA 2, 1942).

The sufficiency of the foundation laid for the admission of secondary evidence rests largely in the discretion of the trial court. As stated in *Western, Inc.* v. *United States*, 234 F.2d 211 (CA 8, 1956), at page 213:

> "The best evidence rule does not require proof of the nonexistence of a document beyond the possibility of mistake, *United States* v. *Sutter*, 21 How. 170, 175, 16 L.Ed. 119, before secondary evidence of its contents is admissable. The rule is not intended as a bar to the ascertainment of truth. The purpose of the rule is to require the production of the best evidence obtainable as to the contents of a document which is shown to be unavailable. The sufficiency of the foundation laid for the admission of secondary evidence rests largely in the discretion of the trial court. *Probst* v. *Trustees of Board of Domestic Missions of General Assembly of Presbyterian Church*, 129 U.S. 182, 188, 9 S.Ct. 263, 32 L.Ed. 642. See also, 20 Am. Jur., Sec. 403, page 364, and Sec. 406, pages 366-367."

Assuming that a proper foundation had not been laid for the admission of the document, its admission, however, would have been "harmless error" because it did not deal with any of the substantive matters of the case but was merely corroborative of Mr. Simonson's testimony. At best, it would merely tend to establish that in fact there was such a person as Hugo Keller. As stated in Rule 52(a) of the Rules of Criminal Procedure:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disre-

garded."

cf. *United States* v. *Trumblay*, 208 F.2d 147 (CA 7, 1953)

Appellant's eleventh assignment of error charges that the court failed "to instruct the jury properly as to what consideration should be given to the testimony of accomplices." This error is alleged to be in two parts, first, the failure to give appellant's requested instruction No. 1, 2, 4 and 5, and secondly, the giving of the court's instruction on the uncorroborated testimony of accomplice, a portion of which appellant sets out on page 17 of its brief.

The record discloses, however, that defendant's requested instructions were not timely filed, as required by Rule 9(i), Rules of the United States District Court for the District of Idaho. (Vol. 1, Clerk's Tr., page 93). Rule 9(i) of the Rules of the United States District Court for the District of Idaho is as follows:

> "REQUEST FOR INSTRUCTIONS. Requested instructions shall be served on opposing parties and filed in duplicate with the clerk, at or before the conclusion of the testimony of the first witness for defendant, unless otherwise agreed between court and counsel."

It appears additionally that appellant has failed to comply with Rule 18 (d), Rules of the United States Court of Appeals for the Ninth Circuit, which provides as follows:

> "When the error alleged is to the charge of the court, the specifications shall set out the part referred to totidem verbis, whether it be in in-

structions given or in instructions refused, together with the grounds of the objection urged at the trial."

In any event, the matter contained in appellant's requested instructions 1, 2 and 4 was contained in other instructions given by the court.

Appellant's requested instruction No. 5, to the effect that the jury could not convict upon the uncorroborated testimony of an accomplice, is not the law in the Federal courts. *United States* v. *Bible*, 314 F.2d 106 (CA 9, 1963); *United States* v. *Toles*, 308 F.2d 590 (CA 9, 1962); *United States* v. *Williams*, 308 F.2d 664 (CA 9, 1962).

This court has been asked before to change this rule and has declined. *United States* v. *Williams*, 308 F.2d 664 (CA 9, 1962).

The instruction given by the court, to which the appellant objects in its eleventh assignment of error, has been approved by this court. *United States* v. *Bible*, 314 F.2d 106 (CA 9, 1963).

The final assignment of error argued by appellant (Specification XII) is that the sentence imposed upon the appellant is excessive in view of the sentences imposed upon the two Simonsons who were involved with the appellant. The Federal courts have consistently held that where the sentence imposed upon conviction was within the limits fixed by law, it was within the discretion of the trial court and would not be disturbed upon appeal. *Berg* v. *United States*, 176 F.2d 122 (CA 9, 1949), cert. den. 338 U.S. 876, 70 S.Ct. 137, 94 L.Ed. 537; *Hayes* v. *United States*, 238 F.2d 318 (CA 10, 1956, cert den. 353 U.S. 983, 77 S.Ct. 1280, 1 L.Ed. 2d 1142; *United*

States v. *Gottfried*, 165 F.2d 360, cert. den. 333 U.S. 860, 68 S.Ct. 738, 92 L.Ed. 1139; *Bell* v. *United States*, 100 F.2d 474 (CA 5, 1938); *United States* v. *Hoffman*, 137 F.2d 416 (CA 2, 1943).

However, when the district court wields the power of sentencing in a manner so as to deprive a defendant of his rights, or to coerce him, the courts have reviewed that sentence. In the case cited by appellant in his brief, *United States* v. *Wiley*, 267 F.2d 453 (CA 7, 1959), the trial judge had made it a policy that defendants who pleaded guilty received more leniency than defendants who did not plead guilty. Thus, at page 458, the court stated:

> "In view of the fact that the trial was expedited by waiving a jury and by stipulation of the various items that expedited the proof *I make the sentence less than I otherwise would. It is, however, a serious crime, and it is a case for the imposition of a sentence, either on a plea of guilty or on a trial.* Had there been a plea of guilty in this case probably probation might have been considered under certain terms, but you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the Court in the imposition of sentence.
>
> " '*Taking into consideration the various factors that you have referred to — and that I have referred to, I make the sentence less than I otherwise would, but a sentence must be imposed.*' "

A court which operates under such a policy is in effect coercing defendants to plead guilty and is abusing its discretionary powers in sentencing. The

Government here has no argument with the decision in the *Wiley* case. However, in this case there is absolutely no showing here of any such action on the part of the court. On the contrary, the court ordered a pre-sentence investigation in order to obtain more background concerning the punishment which should be imposed upon the appellant.

The record in this case discloses that the appellant was in the business of disposing of stolen goods, or, in the vernacular of the trade, a "fence". In order to accomplish this, he must of necessity induce or procure other persons to dispose of the property for him, as was done in this case. The record further discloses that although the witness Simonson had a previous criminal background, since his marriage to Mrs. Simonson, who had absolutely no criminal record, he had actively followed his trade as an electrician and had been in no trouble. Had it not been for the inducement of the appellant in this case, the Simonsons would not have been involved criminally and Mr. Simonson would very likely have followed his trade and lived a life of a rehabilitated citizen. The threat to society from the man who induces others to engage in criminal activities is much greater than the individual who because of those efforts is induced to commit crime.

The fact that the inducer to crime is considered more serious than the mere performer of crime is no more clearly shown than in the Narcotics Control Act of 1956, 70 Stat. 569, 570; 26 U.S.C.A. 7237(d). Under that Act, the mere possession of narcotics (consumption of narcotics), although punishable by a minimum of a five-year sentence, is subject to probation or parole. However, the importing and sell-

ing of narcotics is punishable by a minimum of a five-year sentence and the Court has no discretion to grant a probation, nor may the defendant be paroled.

Viewing the entire record, the district judge was clearly justified in finding that the defendant Ellis was more culpable than either of the two Simonsons, and certainly has not abused the discretion vested in him.

Appellant's assignments of error Nos. 5, 6, 7 and 8 (appellant's brief, page 15) merely go to the matter of sufficiency of evidence to sustain the conviction. The appellant not having argued these points in his brief, no argument will be presented against these points except the general statement that the record clearly discloses sufficient evidence to sustain and justify the conviction.

CONCLUSION

It is submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney
By

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Assistant United States Attorney

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

ROBERT E. BAKES
Assistant United States Attorney

NO. 18551

United States Court Of Appeals

NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS

Appeal from the United States District Court for the
Southern District of California,
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I N D E X

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NO. 18551

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

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BRIEF OF APPELLANTS

Appeal from the United States District Court for the Southern District of California, Central Division

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JURISDICTION

The appellants, Howard P. Carroll and H. Carroll & Co., who will be referred to herein as "defendants," as they appeared in the trial court, or by their respective names, were charged in a six-count indictment with having committed a fraud in the sale of securities in violation of 15 U.S.C. 77q(a) and were tried and convicted on all counts in the United States District Court for the Southern District of California, Central Division.

In identifying the Clerk's Record and the Transcript of Testimony, the letter "P" will be used to signify the page of the Clerk's Record and the letter "R" to identify the page of the Transcript.

The defendant Howard P. Carroll was sentenced by the court to one year on probation and fined $2,500. H. Carroll & Co., a corporation, was fined $50 on each count (P. 345).

The indictment charged an offense against the laws of the United States, and jurisdiction following sentence lies in this Court, pursuant to Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure. A Notice of Appeal was filed within the time and in the manner prescribed by law (P. 351).

STATEMENT OF THE CASE

History

On May 23, 1962, the six-count indictment was returned and filed against Howard P. Carroll and H. Carroll & Co. (P. 2). The indictment charged that the defendants did knowingly, unlawfully, and willfully employ a device, scheme, and artifice to defraud in the sale of Comstock, Ltd. stock by the use of the mails to the six individuals named in the indictment -- all in violation of 15 U.S.C. 77q(a) (P. 2).

The scheme which was charged centered around certain sales of Comstock, Ltd. stock by the brokerage firm of H. Carroll & Co. through its Beverly Hills office.

Various motions attacking the indictment and the actions taken by the United States Attorney in the investigation of H. Carroll & Co. were made prior to trial and denied. Thereafter, trial commenced on November 1, 1962, and after six days of trial

the government rested (R. 784).

The defendants then moved to strike certain testimony and evidence and for a judgment of acquittal (R. 786), and after the court denied the motion to strike and reserved ruling on the motion for a judgment of acquittal the defendants elected to rest their case without putting on evidence (R. 847).

After the defense rested, the motion for a judgment of acquittal was renewed, and the motion was again taken under advisement (R. 850). The trial judge, thereafter, allowed the case to go to the jury, and guilty verdicts were returned against both defendants on all counts (R. 258-259). A motion was then made for judgment notwithstanding the verdict, and the court set arguments on the motion for a judgment of acquittal and the time for sentencing, if the motion was denied, for December 3, 1962 (R. 289). After briefs were submitted, the motion was continued to December 17, 1962, for a further hearing and for the submission of further briefs on the motion for judgment of acquittal and for sentencing, if the motion should be denied (R. 289).

On December 17, 1962, the court denied the motions for a judgment of acquittal and imposed the fines and sentences noted above. Execution and the time for payment of the fine by Howard Carroll was stayed for six months (P. 345).

On December 19, 1962, the court, on its own initiative vacated the stay of execution granted to the defendant Howard P.

Carroll on December 17, 1962, and in lieu thereof entered an order granting the defendants a stay of execution to and including December 28, 1962.

A Notice of Appeal was thereafter duly filed on December 26, 1962 (P. 353).

On December 28, 1962, the $2,500 fine assessed against Howard P. Carroll was paid.

A statement of points was filed on January 13, 1963, in the United States District Court for the Southern District of California, Central Divison (P. 355).

Error is predicated on each of the points specified in the Statement of Points, but space limitations have caused this brief to be limited to the 13 points which are summarized in the index to the argument.

The Facts

The defendant Howard P. Carroll was admittedly the president of H. Carroll & Co., a brokerage firm which had its principal office in Denver, Colorado, and branch offices in various places, including Beverly Hills, California. The other officers and directors of H. Carroll & Co. were Robert Leopold, who was a vice president, and Gerald M. Greenberg (R. 283, 313). Mr. Gerald M. Greenberg served as a trader for the company which did a general brokerage business in over-the-counter securities (R. 313). Prices were set by the trading department on all stocks which were

purchased and sold (R. 318).

In the early part of 1957, a branch office of H. Carroll & Co. was opened and staffed by salesmen hired by Robert Leopold after he had conducted an investigation as to the salesmen's qualifications (R. 287). Thereafter, the office in Beverly Hills was managed by Robert Alaska and Martin McIntyre (R. 288).

During the month of April and later in May 1957, Robert Leopold attended sales meetings at the Beverly Hills office of H. Carroll & Co. to make certain that full and correct representations were made in the sale of stock (R. 294). He said that any salesman found making a misrepresentation was immediately dismissed (R. 288).

From March 1, 1957, to July 1, 1957, the period set forth in the indictment, the Beverly Hills office of H. Carroll & Co. sold various stocks, including Comstock, Ltd., as did other over-the-counter brokerage houses (R. 292). Mr. Leopold also testified that the company lost a large sum of money in the operation of its Beverly Hills office by reason of the actions of its personnel during the critical period (R. 294). In selling stock, H. Carroll & Co., according to Mr. Leopold, obtained prices for the stock which was to be sold from other brokers and never set a market (R. 299-305). His testimony was corroborated by Mr. Greenberg, who said that prices for stocks were obtained from other brokers over the teletype machine (R. 318).

In the early part of 1957, Howard P. Carroll was introduced to David Alison, who was endeavoring to obtain money to further develop his charcoal manufacturing and sales operation (R. 91). Mr. Alison was a rancher from Ventura, California, who held an interest in the ranch which was known as El Rancho Cola (R. 77). He contacted Mr. Carroll after he had exhausted all avenues of obtaining money to carry out a charcoal burning and sales program which Col. T. R. Gillenwaters had formulated for Country Club Charcoal (R. 483). The ranch which Mr. Alison had an interest in was grown over with live oak, and it was his plan to burn the oak in kilns and manufacture charcoal briquettes for sale to supermarkets and other outlets in the California area (R. 78). To carry out his plans, he had formed Country Club Charcoal, a Nevada corporation, with the assistance of Col. T. R. Gillenwaters and had borrowed $67,500 from a company which was controlled by Col. Gillenwaters to build kilns and otherwise develop his charcoal operation (R. 79).

Col. Gillenwaters thereafter chartered the course of Country Club Charcoal and caused it to merge into Comstock, Ltd. (R. 82). Comstock, Ltd. was a mining company whose stock was listed on the San Francisco Mining Exchange at the time the merger was effected (R. 150). Its stock was held principally by Archie Chevrier, who operated a brokerage firm under the name of Chevrie & Co. in San Francisco, California (R. 83-84). To acquire

part of the stock held by Archie Chevrier, David Alison and others signed notes in the principal amount of $125,000. The certificates representing the stock previously owned by Archie Chevrier and purchased by David Alison eventually turned up in an escrow account at the Securities Transfer Corporation in Denver, Colorado, for release to David Alison, or his order, upon the payment of 25 cents per share (R. 396). Thereafter, David Alison, with the assistance of Col. T. R. Gillenwaters, endeavored to build kilns and sell charcoal to various commercial outlets in the State of California and did sell and contract to sell substantial amounts of charcoal to various supermarkets and other stores (R. 137-144). Money for the development operations of Comstock, Ltd. came from funds paid into the company by H. Carroll & Co. as a result of the purchase of stock on deposit at the Securities Transfer Corporation at 25 cents per share (R. 396). Stock was also purchased by H. Carroll & Co. from the firm of Chevrier & Co., a member of the San Francisco Mining Exchange. Shares purchased were thereafter sold as principal to various customers.

Otto P. Gustte testified that he had examined the purchase and sales journal of H. Carroll & Co. during the course of his investigation for the Securities and Exchange Commission and had discovered that during the period questioned in the indictment H. Carroll & Co. had sold 407,950 shares of stock of Comstock, Ltd. to its customers (R. 715), and that the records reflected that

H. Carroll & Co. had acquired 313,000 of the shares from the Securities Transfer Corporation escrow account (R. 715). During the period set out in the indictment, the stock fluctuated from 25 cents to 36 cents per share on the San Francisco Mining Exchange.

Comstock, Ltd., during early 1957, had caused a brochure (Exhibits 57 and 85) to be prepared to report the production efforts and present activities of the company to its stockholders (R. 537). The brochure was prepared by Col. T. R. Gillenwaters and Kenneth Raetz and was never seen by Howard P. Carroll prior to the time that it was completed (R. 543). Some of the brochures were used by salesmen of H. Carroll & Co. in connection with the sale of Comstock, Ltd. stock. Salesmen of H. Carroll & Co. attended a meeting where Col. Gillenwaters was introduced, with Henry Caulfield, Howard P. Carroll, David Alison, and others in Beverly Hills, California, during April of 1957 (R. 94). At the meeting the potential of the charcoal industry was explained, and subsequent to the meeting the salesmen were all taken to the project at Ventura, California, to see just what development was taking place (R. 95).

Nearly five years after the last sale of Comstock, Ltd. was made by H. Carroll & Co., charges were made to the Grand Jury and an indictment was returned and filed on May 23, 1962, which provided the basis for a trial that extended over six days (P. 2).

During the course of the trial, the prosecution called David Alison to describe his part in the management and development of the charcoal business (R. 77-157). In addition to Mr. Alison, the prosecution looked to Col. T.R. Gillenwaters for testimony as to his work as an industrial consultant and as a management expert in causing Country Club Charcoal to be merged into Comstock, Ltd. (R. 481, 482). The prosecution also called Kenneth Raetz, an advertising executive, H. Ward Dawson, and Ralph Frank to testify about the preparation of the brown brochure that was prepared for submission to the stockholders of Comstock, Ltd. (Exhibits 57 and 85) (R. 517-555, 387-407, 672-697).

Other than witnesses of the type named, the prosecution called salesmen of H. Carroll & Co. and the investor witnesses named in the indictment and others who had purchased stock to show the representations and basis upon which the stock was purchased. (Marems R. 567-578; Moen R. 606-14; Bloemsma R. 600-606; Bryer R. 423-440; Graham R. 614-620; Indorff R. 590-600; Johnson R. 408-423; Krell R. 558-566; Wisda R. 578-590; Wyatt R. 658-670.)

All of the officers and directors of H. Carroll & Co. and other employees connected with the trading and bookkeeping department of H. Carroll & Co. were called as witnesses to testify about the manner in which the sales of Comstock, Ltd. stock were

carried out and the part played by Howard P. Carroll in the operation of H. Carroll & Co. (Greenberg R. 312-344; Leopold R. 249-309; Scholz, R. 361-386; Tice R. 346-361; Uhlir R. 467-481). In addition to the witnesses named, the prosecution called Gaither G. Loewenstein to testify as to records maintained by Chevrier & Co. in its dealings with H. Carroll & Co. when stock was purchased by H. Carroll & Co. over the San Francisco Mining Exchange (R. 727-732). The remainder of the testimony related to documents and things which were located in the course of the investigation by the staff of the Securities and Exchange Commission. Testimony disclosed that Marvin Greene, an employee of Securities and Exchange Commission, sent a letter of inquiry to the law firm of Wainwright and Fleischell, 841 Flood Building, San Francisco 2, California (R. 458-465). In response to his inquiry, a letter was received from J. Edward Fleischell bearing the date of October 18, 1957, and addressed to Mr. Marvin Greene, Securities and Exchange Commission, Regional Office, Room 339, 821 Market Street, San Francisco, California. Mr. Greene testified that he received the letter in the mail and that it was part of the records of the Securities and Exchange Commission (R. 462-465). J. Edward Fleischell was not identified as an attorney for either of the defendants or connected in any way to the defendants or to Comstock, Ltd., David Alison, Col. T. R. Gillenwaters, or any other person who had an interest in any of the transactions which

involved Comstock, Ltd. or H. Carroll & Co. The letter listed certain Comstock, Ltd. certificate numbers, the number of shares represented thereby, and the names of certain persons who were allegedly record owners thereof.

The letter in question (Exhibit 22) was admitted into evidence upon the identification of Mr. Greene and on the basis of the Federal Business Records as Evidence Act, 28 U.S.C. 1732 (R. 465). Thereafter, the prosecution offered records which they had obtained from the Nevada Transfer Agency relating to an account kept as transfer agent for Comstock, Ltd. and the records (Exhibits 28, 29, 30 and 31) (R. 741) were offered and received into evidence under the authority of the Business Records as Evidence Act, 28 U.S.C. 1732. The only foundation for the admission of the Nevada Transfer Agency records was the stipulation by counsel for the defense that the records were part of the Nevada Transfer Agency records. They were objected to because no proper foundation was laid and because the exhibits were necessarily hearsay in the light of this Court's pronouncement in Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958) (R. 649-650).

Also received into evidence as a business record was a stack of confirmation slips, bank drafts, and notices that William Ziering obtained from Archie Chevrier in the basement of the San Francisco Mining Exchange and which Mr. Ziering said

were the records of Chevrier & Co., a brokerage firm in San Francisco, Exhibits 18 and 104 (R. 711, 729). The Chevrier & Co. records also contained certain confirmation slips that were on forms that bore the name of H. Carroll & Co. The prosecution offered the Chevrier & Co. records relating to Comstock, Ltd. (Exhibit 104) after having the documents which reflected purchases of Comstock, Ltd. stock over the San Francisco Mining Exchange identified by Gaither Loewenstein, who had formerly been employed by Chevrier & Co. (R. 727-732).

The confirmation slips of H. Carroll & Co. that were taken from the Chevrier & Co. storage area in the basement of the San Francisco Mining Exchange were admitted into evidence as business records after being identified by Liboslav Uhlir as forms of the type used by H. Carroll & Co. (R. 707, 708). All of the exhibits referred to were admitted under the Business Records as Evidence Act, 28 U.S.C. 1732).

Howard Sillick, who was a staff accountant for the Securities and Exchange Commission, was called. He offered testimony relating to his preparation of Exhibits 105 and 106 (R. 742, 754). Exhibits 105 and 106 were charts which Mr. Sillick had prepared to summarize his conclusions regarding the various documentary exhibits. Exhibit 105 was said to be a summary of Exhibit 22 and Exhibits 28, 29, 30, and 31 (Nevada Transfer Agency Records) and was offered apparently for the purpose of tracing stock of

Comstock, Ltd. to the investor witnesses named in the indictment from Archie Chevrier (R. 741). Exhibit 106 was a chart which Mr. Sillick prepared reflecting the number of shares of Comstock, Ltd. which were traded on the San Francisco Mining Exchange from March to June of 1957, and was apparently also prepared to show the number of shares of stock of Comstock, Ltd. delivered by Chevrier & Co. to H. Carroll & Co. Exhibit 106 was prepared, according to Mr. Sillick, from information which he had taken from Exhibit 104, records of Chevrier & Co. and the quotation sheets of the San Francisco Mining Exchange for the months of March to June of 1957 (Exhibits 32, 33, 34 and 74). Both charts were admitted into evidence, even though Mr. Sillick testified that clarification was required in preparing the compilations which formed the basis of his charts and that he had written the Nevada Transfer Agency and received the information which was necessary to complete the exhibits (R. 770-771). After Mr. Sillick admitted using matters not in evidence to prepare the charts, a motion to strike both Exhibit 105 and Exhibit 106 was made (R. 771). Both Exhibit 105 and Exhibit 106 were admitted over the defendants' objection that no proper foundation had been laid for their admission and that matters were contained therein that were immaterial and incompetent to the issues on trial (R. 768).

Objections were constantly made to leading questions, and the court was called upon to intervene on many occasions and asked over 450 questions of the various witnesses called by the prosecution. At the conclusion of the case, the court said:

> "I must say that it is regrettable that the court has to do a good part of the examination of witnesses, but I suppose the court is here for the purpose of bringing about justice and it is necessary to be done.
>
> "I want to forewarn the Government, however, that I am not going to continue doing the practice of law that I have done in this case." (R. 1024.)

Earlier, the court had said, when reviewing the evidence:

> ". . . I want to say this to counsel for the government, that it is regreatable [sic], and the Court doesn't enjoy the process of having to correct you on all these occasions. . . .
>
> ". . . The thing that is bothersome in the case is that there is so much leading and suggestive interrogation that I have difficulty in determining whether it is the evidence of the witnesses or not. You must realize that a man to be convicted of a felony has to be convicted on evidence, proper evidence before the Court. And much of this evidence I am absolutely in doubt at this time as to whether or not it is the suggestion. I do not mean you did it intentionally. But the leading of the witness was such that I do not know whether his answers were his own testimony or whether he was just adopting the leading question. It's a real problem, believe me it is." (R. 829-830.)

After the prosecution rested its case, defense counsel made a motion to strike certain testimony and evidence and then moved for a judgment of acquittal (R. 785-786). When the trial court was asked by defense counsel whether it desired that the evidence be reviewed to establish the insufficiency of the government's case,

the court said:

> "I want to hear from the government first. I want to hear wherein he thinks the evidence is sufficient. I might say this very frankly: I think that perhaps there is a bare sufficiency of evidence of a prima facie case. In the state of the record though the question is taking the evidence in the most favorable light to the government is there a prima facie case. I would like to hear from the government." (R. 787.)

Thereafter, the court reviewed the indictment paragraph by paragraph with the United States Attorney. The first paragraph and charge in the indictment was that:

> "(1) From on or about March 1, 1957, until on or about July 1, 1957, the defendants Howard P. Carroll and H. Carroll & Co., a corporation, in the offer and sale of . . . the common stock of Comstock, Ltd., employed a device, scheme, and artifice to defraud, obtain money and property by means of untrue statements and material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading and engaged in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon purchasers of the common stock of Comstock, Ltd."

The indictment then sets forth in six subparagraphs the manner in which the government charged that the defendants perpetrated a scheme to defraud.

In questioning the United States Attorney relating to the issue of the general scheme, the United States Attorney stated that the scheme consisted of the purchasing of a substantial portion of the Comstock, Ltd. stock sold through the facilities of the San Francisco Mining Exchange while at the same time purchasing stock from another source. Concurrently stocks of

Comstock, Ltd. are sold as principal to customers of the defendant corporation, sometimes by means of a stockholders' report on Comstock, Ltd. Analyzing the indictment, the court asked the United States Attorney about subparagraph (a), which provided:

> "(a) At the end of 1954, Comstock, Ltd., which had been organized in 1931, but which had been inactive for a number of years, had no assets and was insolvent. During 1955, Archie H. Chevrier ('Chevrier'), a member of the San Francisco Mining Exchange, a national securities exchange, acquired approximately 500,000 shares of the 700,000 shares, then outstanding, of Comstock, Ltd. For his services in obtaining a quicksilver mining lease at Cloverdale, California, and advancing funds to Comstock, Ltd., for construction of a mill, Chevrier received an additional 285,000 shares of 'treasury' stock of Comstock, Ltd. Chevrier also caused the stock of Comstock, Ltd. to be registered on the San Francisco Mining Exchange, a national securities exchange. This registration became effective in October, 1955. The Cloverdale mine was shut down in the latter part of 1956."

The United States Attorney, when questioned about subparagraph (a), admitted that the allegations contained therein had not been proved (R. 791).

Subparagraph (b) was the next subject of inquiry and provided:

> "(b) In December, 1956, Chevrier entered into an agreement with David R. Alison ('Alison') under which Chevrier transferred 500,000 shares of Comstock, Ltd. to Alison and a group of Alison's associates, in consideration of six promissory notes in the total sum of $125,000 (25¢ per share), all payable on December 31, 1957. These securities were held in escrow by Alison's attorney until delivery of the six notes to Chevrier which occurred in February, 1957. This block of 500,000 shares was then placed in escrow at Security Trust and Transfer Company in Denver, Colorado, pursuant to an agreement under which defendant H. Carroll & Co., a broker-

dealer in securities, received an option to take down such shares upon deposit of 25 cents per share in the escrow account."

The court, in examining the evidence, said that the government had made a prima facie showing as to these allegations (R. 792).

Subparagraph (c) was next looked to, which provided:

"(c) Comstock, Ltd. also agreed to issue 1,500,000 shares of its stock in exchange for all the assets of Country Club Charcoal Corporation, of which Alison was a promoter and principal stockholder. Neither Country Club Charcoal Corporation nor its predecessor had earned any profits at the time its assets were acquired by Comstock, Ltd. in March, 1957."

The United States Attorney, when questioned about subparagraph (c), admitted that subparagraph (c) had not been proven and caused the court to say:

"Well, the holes are just developing fast." (R. 792.)

Subparagraph (d) provided:

"(d) On or about March, 1957, the defendants Howard P. Carroll and H. Carroll & Co., whose main office was in Denver, Colorado, caused a branch office to be established in Beverly Hills, California. The defendant Howard P. Carroll was president, a director and controlling stockholder of H. Carroll & Co. From about March 1, 1957, to July, 1957, the defendant H. Carroll & Co., through its Beverly Hills office, sold about 300,000 shares of the stock of Comstock, Ltd. to members of the investing public. During that period the price of said stock advanced on the San Francisco Mining Exchange from 25 cents per share to 36 cents per share. The majority of the shares sold by H. Carroll & Co. was obtained at 25 cents per share from the block of 500,000 shares placed in escrow, with the balance being purchased through Chevrier on the San Francisco Mining Exchange. The defendant H. Carroll & Co. sold the stock of Comstock, Ltd. acquired from the escrow account, so established in

Denver, to the public at a price between the bid and ask price on said Mining Exchange."

In analyzing subparagraph (d) in the light of the record, the evidence discloses:

(1) That the defendants Howard P. Carroll and H. Carroll & Co. had their main office in Denver, Colorado, and caused a branch office of H. Carroll & Co. to be established in Beverly Hills, California.

(2) That Howard P. Carroll was president and one of three directors of H. Carroll & Co. (R. 792).

(3) That approximately 300,000 shares of stock of Comstock, Ltd. were sold to members of the investing public (R. 792).

(4) That the records of the San Francisco Mining Exchange establish that from March to July of 1957 the price on the Mining Exchange fluctuated from 25 cents per share to 36 cents per share for Comstock, Ltd. (R. 793).

(5) That no other part of the charge in subparagraph (d) was established by any evidence, other than that stock of Comstock, Ltd. was purchased by H. Carroll & Co. at 25 cents per share from the shares on deposit with Securities Transfer Corporation and that other similar shares had been purchased on the San Francisco Mining Exchange through Chevrier & Company.

(6) That the United States Attorney had not established from testimony that the stock was sold between the bid and ask

price on the Mining Exchange (R. 793). All of the stock that was sold by H. Carroll & Co. was sold as principal with the confirmations clearly reflecting the designation of the brokerage house as a principal (R. 587).

Subparagraph (e) was next in line for an analysis:

> "(e) During the period from March, 1957, to July, 1957, the defendant H. Carroll & Co. caused to be purchased through Chevrier on the San Francisco Mining Exchange approximately 87,000 shares of approximately 129,000 shares of the stock of Comstock, Ltd. purchased on said Exchange during said period, for the purpose of creating a false and misleading appearance of active trading therein, and for the purpose of raising and maintaining the price thereof, in order to facilitate the sale of said stock, which the defendant H. Carroll & Co. was then selling to investors."

The court inquired of the United States Attorney where the evidence was of the charge made in subparagraph (e) and was advised that it was a jury question as to why stock was being purchased on the Exchange when the defendant had at approximately the same time in fact purchased stock at 25 cents a share. The record is silent as to the existence of any wash sales. The sole evidence is that H. Carroll & Co. purchased stock of Comstock, Ltd. over the San Francisco Mining Exchange and from a deposit with the Securities Transfer Corporation and contemporaneously sold shares of stock of the same company as principal to various investors who purchased the stock.

Subparagraph (f) provided:

"(f) The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors and to induce them to purchase shares of the stock of Comstock, Ltd., used and caused to be used a brochure describing Comstock, Ltd. entitled 'A report to stockholder,' and other similar brochures, which contained false and misleading statements with respect to the management, assets, business affairs and future prospects of Comstock, Ltd., and which were designed to arouse the interest of investors and to induce them to purchase shares of the stock of Comstock, Ltd. These brochures also omitted to state material facts with respect to the management, assets, business affairs and future prospects of Comstock, Ltd."

Obviously, the acts charged and the brochure in question constituted acts which were carried out by the management of Comstock, Ltd., Kenneth Raetz, Col. T. R. Gillenwaters, and David Alison. The brochure was admittedly the product of the work of Col. Gillenwaters and Kenneth Raetz and was not shown to Howard P. Carroll or any officer, director, or managing agent of H. Carroll & Co. in its final form before it was printed (R. 543).

After reviewing Paragraph 1 and its subparagraphs, the court commented that the crux of the matter lay in the next two paragraphs (R. 796).

Paragraph 2 provided:

"(2) The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., made and caused to be made untrue, deceptive and misleading statements of material facts, including the following:

"(a) That the stock of Comstock, Ltd. was being offered and sold at the market price.

"(b) That Comstock, Ltd. operated a quicksilver mine in Cloverdale.

"(c) That Comstock, Ltd.'s course was being chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record.

"(d) That Country Club Charcoal Corporation was on the verge of fantastic profits; and other

similar untrue, deceptive and misleading statements of material facts, all of which the defendants well knew to be false, fraudulent and misleading."

In reviewing the allegations with the United States Attorney:

1. The court stated that one witness, Raymond Wyatt, had said that the stock of Comstock, Ltd. was being offered and sold at the market price and that, therefore, there was evidence that subparagraph (a) was supported by testimony (R. 796).

2. The court found that subparagraph (b) was not the subject of testimony, and the United States Attorney admitted that they had given up on subparagraph (b) (R. 797).

3. As to subparagraph (c), the government proved contrary to the allegations that Comstock, Ltd.'s course was in fact being chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record (R. 493, 496-501).

4. The court found that the government had offered evidence on the question of fantastic profits (R. 797).

The breadth of the remaining allegation had previously been the subject of a motion to strike, which the court held was not well founded.

The court next reviewed Paragraph 3 with the United States Attorney, which provides:

> "3. The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., omitted to disclose to investors material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, including the following:
>
> "(a) That there was no free and open market for the shares of Comstock, Ltd., and that the then existing price at which such stock was sold by H. Carroll & Co., was maintained, dominated and controlled by the defendants Howard P. Carroll and H. Carroll & Co.
>
> "(b) That the major part of the shares of Comstock, Ltd. sold to investors by the defendants was obtained at 25 cents per share from a block of 500,000 shares of Comstock, Ltd., placed in a Denver, Colorado, escrow account.
>
> "(c) That Country Club Charcoal Corporation had never made any profits and had not paid off debts incurred prior to its merger with Comstock, Ltd.
>
> "(d) That the Cloverdale quicksilver mine had been shut down in November or December of 1956.
>
> "(e) That Comstock, Ltd.'s course was not chartered by Colonel Gillenwaters.

"(f) That the projected profit per month for 1957-1958 for Comstock, Ltd. of $51,765.00 was an estimate for the future, having no valid or substantial basis in fact.

The court conceded the contention of the government that a failure to disclose that there was no free and open market for the shares of Comstock, Ltd. was a material matter (R. 797). This would be true only upon proof that "no free and open market" did in fact exist.

Counts One, Five, and Six were singled out for attack on the basis of being barred by the statute of limitations in the argument of the motion for judgment of acquittal, since the sales and the fraud which was allegedly perpetrated, if any, was completed more than five years prior to the filing of the indictment. In considering the issue of the statute of limitations, the court found that the stock which was the subject of Counts One, Five, and Six had been delivered within the five-year statutory period.

The record reflects that the check and confirmation slip evidencing the sale and payment charged in Count One occurred on May 7 of 1957 and May 10 of 1957 (Exhibits 54 and 55). No evidence existed as to any transaction within five years prior to May 23, 1962, other than the signing of a receipt of the stock certificate by Robert Wisda after the sale had been closed and the stock delivered (R. 779).

The same factual situation existed as to Count Five, where Exhibits 66 and 67 showed a receipt for stock on June 19, 1957, by Mr. Bloemsma, who could not remember anything regarding the sale or purchase at all (R. 605).

Mr. Indorff, who was the subject of Count Six in the indictment, identified an order blank that bore the date of May 6, 1957 (Exhibit 58) (R. 595). He also testified as to a receipt for payment of the shares on May 6 of 1957 (Exhibit 59) (R. 593). Subsequent to the purchase and sale he said that he had received a stock certificate (Exhibit 64) (R. 597) through the mails in an envelope (Exhibit 60) that bore the name of H. Carroll & Co. (R. 594).

After hearing argument on the issues relating to the sufficiency of the proof to sustain the indictment, the court instructed the jury and refused to give favorable instructions to the defendants, because defense counsel had asked that he be informed as to what the instructions were, in accordance with Rule 30, Federal Rules of Criminal Procedure (R. 904). After argument was held and the instructions given to the jury, the defendants were both convicted on all counts, including Count Five, which involved Mr. Bloemsma, who could not recall any of the events or any of the representations that were made relative to his purchase of stock from a salesman of H. Carroll & Co.

STATEMENT OF POINTS

POINT ONE

THE TRIAL COURT ERRED IN ADMITTING EXHIBIT 22 AFTER TIMELY OBJECTION WAS MADE, IN THAT EXHIBIT 22 WAS HEARSAY AS TO THE DEFENDANTS HOWARD P. CARROLL AND H. CARROLL & CO.

POINT TWO

THE TRIAL COURT ERRED IN ALLOWING CORPORATE RECORDS OF CORPORATIONS WHICH DID NOT APPEAR AS PARTIES DEFENDANT TO BE ADMITTED AS EVIDENCE AGAINST THE DEFENDANTS, AFTER TIMELY OBJECTION WAS MADE, WHEN SUCH RECORDS WERE NOT MATERIAL, RELEVANT, OR COMPETENT AND WERE NOT CONNECTED TO THE DEFENDANTS IN ANY WAY AND WERE NOT ADMISSIBLE UNDER THE FEDERAL BUSINESS RECORDS AS EVIDENCE ACT, 28 U.S.C. 1732, AND NO PROPER FOUNDATION WAS LAID.

(a) THE DEFENDANTS WERE PREJUDICED BY THE ADMISSION OF THE NEVADA TRANSFER AGENCY RECORDS (EXHIBITS 28, 29, 30 AND 31).

(b) THE DEFENDANTS WERE PREJUDICED BY THE ADMISSION OF RECORDS OF CHEVRIER & CO. (EXHIBITS 18 AND 104).

POINT THREE

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF HOWARD SILLICK TO BE ADMITTED AS TO HIS COMPUTATIONS AND AS TO ALL MATTERS CONTAINED IN EXHIBITS 105 AND 106 (CHARTS PREPARED BY HOWARD SILLICK), IN THAT FACTS AND MATERIALS WERE RELIED UPON IN

THE PREPARATION OF SUCH EXHIBITS WHICH WERE EITHER NOT IN EVIDENCE OR WERE INADMISSIBLE AND WERE NECESSARILY HEARSAY AS TO THE DEFENDANTS.

POINT FOUR

THE DEFENDANTS WERE PREJUDICED WHEN THE UNITED STATES ATTORNEY CONTINUALLY AND REPEATEDLY ASKED LEADING QUESTIONS TO EVERY PROSECUTION WITNESS, OVER THE COURT'S WARNING AND AFTER CONTINUED AND REPEATED OBJECTIONS WERE MADE.

POINT FIVE

THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANTS' MOTION FOR A JUDGMENT OF ACQUITTAL AS TO COUNTS ONE, FIVE, AND SIX OF THE INDICTMENT, IN THAT THE EVIDENCE PRESENTED AND THE CHARGES MADE IN THE INDICTMENT RELATING TO SUCH COUNTS WERE BARRED BY THE STATUTE OF LIMITATIONS. 18 U.S.C. 3282.

POINT SIX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO STRIKE THE SURPLUSAGE APPEARING IN THE INDICTMENT AND THEREBY PREJUDICED THE DEFENDANTS.

POINT SEVEN

THE TRIAL COURT ERRED IN ALLOWING RALPH FRANK TO TESTIFY, AFTER TIMELY OBJECTION, AS TO A TELEPHONE CALL WITH WARD DAWSON, WHICH WAS MADE OUT OF THE PRESENCE OF THE DEFENDANTS AND WAS NOT CONNECTED TO THE DEFENDANTS IN ANY WAY.

POINT EIGHT

THE COURT ERRED IN ADMITTING EXHIBIT 1 AFTER TIMELY OBJECTION WAS MADE.

POINT NINE

THE TRIAL COURT DENIED THE DEFENDANTS A FAIR TRIAL BY CONSTANTLY AND CONTINUOUSLY INTERRUPTING THE WITNESSES TO PROPOUND THE COURT'S OWN QUESTIONS AND IN CONSTANTLY ASSISTING THE UNITED STATES ATTORNEY IN THE PRESENTATION OF THE PROSECUTION'S CASE.

POINT TEN

THE TRIAL COURT PREJUDICED THE RIGHTS OF THE DEFENDANTS AND DENIED THE DEFENDANTS A FAIR TRIAL BY REQUIRING DEFENSE COUNSEL TO MAKE LEGAL ARGUMENTS ON THE ADMISSIBILITY OF EVIDENCE IN THE PRESENCE OF THE JURY.

POINT ELEVEN

THE TRIAL COURT ERRED IN ELECTING NOT TO GIVE INSTRUCTIONS THAT WERE FAVORABLE TO THE DEFENDANTS, BECAUSE DEFENSE COUNSEL, IN COMPLIANCE WITH RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE, REQUESTED THAT THEY BE INFORMED OF THE INSTRUCTIONS WHICH THE COURT WOULD GIVE OR THE ACTION WHICH THE COURT WOULD TAKE ON THE INSTRUCTIONS TENDERED BY THE PROSECUTION AND THE DEFENSE.

POINT TWELVE

THE JURY'S VERDICT IS NOT SUPPORTED BY SUBSTANTIAL OR COMPETENT EVIDENCE WHICH WOULD ESTABLISH THE DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT, AND THE DEFENDANTS WERE ENTITLED TO

A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW.

POINT THIRTEEN

THE CUMULATIVE EFFECT OF EACH AND ALL OF THE ERRORS COMPLAINED OF WAS TO DENY THE DEFENDANTS A FAIR AND IMPARTIAL TRIAL.

A R G U M E N T

POINT ONE

THE TRIAL COURT ERRED IN ADMITTING EXHIBIT 22 AFTER TIMELY OBJECTION WAS MADE, IN THAT EXHIBIT 22 WAS HEARSAY AS TO THE DEFENDANTS HOWARD P. CARROLL AND H. CARROLL & CO.

A letter on the letterhead of the law firm of Wainwright and Fleischell, 841 Flood Building, San Francisco 2, California, was marked as Exhibit 22 and was admitted into evidence as a business record under the authority of 28 U.S.C. 1732. The letter bears the date of October 18, 1957, and was addressed to the Securities and Exchange Commission, Regional Office, Room 339, 821 Market Street, San Francisco, California. Marvin Greene, who was then an employee of the Securities and Exchange Commission, was the person to whom the letter was directed (R. 462). He testified that he received the letter in the mail after he had requested information from Mr. Fleischell. J. Edward Fleischell was not identified as an attorney for either of the defendants or connected in any way with the defendants or any other person who had an interest in any of the transactions

which involved Comstock, Ltd. or H. Carroll & Co. The letter listed certain Comstock, Ltd. certificate numbers, the number of shares represented thereby, and the names of the persons he was told were record owners thereof. Exhibit 22 was obtained as part of the investigative effort of the Securities and Exchange Commission and used to determine the number of shares of Comstock, Ltd. stock that was sent by various people to the Securities Transfer Corporation to carry out an agreement between Archie Chevrier and David Alison. Apart from the certificate numbers and number of shares involved, the letter stated:

> "Dear Mr. Greene:
>
> "I have just received this morning the following list of certificates of the common stock of Comstock, Ltd. which you have requested. They read as follows:
>
> . . . .
>
> "You will note that the total is 495,266 shares. I believe that the difference between the figure and the 500,000 were other certificates not known to Mr. Alison. In the event we can assist you further, please be assured that we will cooperate in every way.
>
> "Very truly yours,
>
> WAINWRIGHT AND FLEISCHELL
>
> By J. Edward Fleischell"

The author of the letter did not appear as a witness, and counsel for the defense had no opportunity for cross-examination. The foundation for the admission of Exhibit 22 was Marvin Greene's testimony that he had received Exhibit 22 in the mail

and that it was part of the files of the Securities and Exchange Commission. Exhibit 22 was objected to on the basis of the incomplete and improper foundation which was laid and for the further reason that the letter was hearsay (R. 465). By the very terms of the letter, the data contained therein was based upon information supplied to Mr. Fleischell by a person or persons unknown and was, therefore, hearsay on hearsay.

The authenticity of the matters set forth in Exhibit 22 does not appear from any other exhibit and is not established by the testimony of any witness. To determine whether Exhibit 22 was properly admitted, it is necessary to determine whether the exhibit falls within the Federal Business Records as Evidence Act which provides an exception to the hearsay rule and relates to the competency of evidence. 28 U.S.C. 1732.

Obviously, the admission of Exhibit 22 was proper if a proper foundation was laid and if the exhibit is the type and kind specified and excepted in 28 U.S.C.A. 1732. 28 U.S.C.A. 1732 provides as follows:

> "Record Made in Regular Course of Business. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event of such act, transaction, occurrence, or event, if made in regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter. . . ."

The breadth of the Act has been recognized in many cases, but every document or paper which is offered as evidence does not fall within the Act. Before any writing or record may be admitted, it must be made as a memorandum or a record of an act or transaction in the regular course of business and as part of the regular course of that business. The further requirement exists that the memorandum must be of a type that was made in the regular course of such business and at the time of the act or transaction which it purports to show or a reasonable time thereafter. In Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719 (1943), the use of accident reports kept by a railroad company and statements taken by the railroad of its engineer in the ordinary course of business was condemned. The railroad's argument was predicated on the fact that the engineer who had given the statement had died. In the Palmer case, the Court refused to accept the premise that the statement was made in the regular course of business within the meaning of 28 U.S.C. 695, which was the predecessor to the present statute. The Supreme Court found that the statement complained of was not a record which was made in the systematic conduct of the business as a business. The mere maintenance of records relating to the railroad's investigation of an accident and its employee's version of an accident did not make a statement admissible. The trustworthiness required by the Business

Records Act, in the opinion of the Court, stems from the routine reflection of daily business. Accord, United States v. Plisco, 192 F. Supp. 339 (D.C.D.C. 1961).

In following Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719 (1943), this Circuit has had occasion to strike down two efforts to go beyond the intent of the statute. In a civil antitrust suit by a gasoline retailer against various major oil companies for treble damages under the Sherman Antitrust Act and its various counterparts, the trial court allowed the admission of various exhibits which the plaintiff obtained by his use of the discovery rules. The exhibits, which were questioned on appeal were letters, telegrams, memoranda and reports, and were admitted under the theory that the exhibits fell within the liberal construction of 28 U.S.C.A. 1732. Standard Oil Company v. Moore, 251 F.2d 188 (9th Cir. 1957). In reversing, Judge Hamley, speaking for a unanimous Court, held that the mere fact that a letter had come from the file of a corporation did not, without more, render it admissible. The Court condemned the fact that some of the letters contained information which the writer attributed to others. The Court held that the duty to make the memorandum in the regular course of business did not exist as to most exhibits. The error was held to lie not only in the admission of hearsay evidence, but also in the fact that the records were not kept in the course

of business. Accord, N.L.R.B. v. Sharpless, 209 F.2d 645 (6th Cir. 1954); Bisno v. United States, 299 F.2d 711 (9th Cir. 1961).

Of like effect is Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), where the Ninth Circuit again looked to the breadth of the Business Records Statute in determining whether or not the Court had properly admitted the minutes of a corporation which had made a loan to the defendant in a tax evasion case. On appeal, after conviction, the defendant taxpayer was held not to be bound by the book entry of the corporation which made the loan to him to purchase the stock in question. In so holding, the Court found that the taxpayer had not assented to the correctness of the books. The Court, in reversing, said, in considering the minutes which were admitted over objection:

> ". . . Even if this document were admissible, it laid no foundation for the introduction of the minutes of an executive committee of A.B.C. Delaware as against taxpayers who were not present, even according to the purported minutes.*3 The whole recorded transaction was one between the parent corporation and its Oregon subsidiary. There was no proof that the record was made

*3The records of a corporation 'are not competent evidence against third persons to prove contracts with them in the absence of proof that they knew and assented thereto.' Oregon & C.R. Co. v. Grubissich, 9 Cir., 206 F. 577, 580. The expression 'not necessary to decision,' in the following case is pat: 'Corporate books of account are not competent against a stranger merely because they are the books of the company whose dealings they purport to record.' United States v. Fineberg, 2 Cir., 140 F.2d 592, 596, 154 A.L.R. 272.

in the regular course of business.*4 No witness testified as to the authenticity.*5

*4The case of Bruce v. McClure, 5 Cir., 220 F.2d 330, 335, contains the following quotation from 65 A.L.R.: 'The general rule is that before the books of a corporation are admissible in evidence, their authenticity must be shown. It must be made to appear that they are the books of the corporation, that they have been kept as its records, and that the entries made therein were made by the proper acting officer for that purpose. . . .'

*5There was a stipulation which established that the record was that of the parent company, that it was in appropriate custody and that it was the true record of the meeting which it purported to record, but this stipulation did not cure the other defects pointed out or make it competent, relevant, or material against taxpayer. See, Parish's Estate v. C.I.R., 187 F.2d 390, 395-396." Niederkrome v. C.I.R., 266 F.2d 238, 241.

A case even more squarely in point is Smith v. Bear, 237 F.2d 79 (2nd Cir. 1956), 60 A.L.R.2d 1119, where the plaintiff sued his stockbroker for an alleged breach of duty under the Federal Securities Act and sought to introduce into evidence a memorandum relating to an oral agreement which contravened the contract requirements set forth in his contract to purchase. In upholding the trial court's refusal to admit a memorandum relating to the plaintiff's efforts to vary his written contract with his broker by parol, the Court found that a luncheon memorandum which was dictated by a bank officer relating to the investment complained of and his impressions, as well as other facts, was inadmissible and did not constitute a record kept in the ordinary course of business, because it was not the bank officer's

duty to make the record.

To add to the prejudice that resulted to the defendants from the admission of Exhibit 22, this Court must recognize the fact that the letter was part of the investigation of the Securities and Exchange Commission and was, in effect, the same as a police report, which is uniformly excluded. 5 Wigmore, Evidence (3rd ed.) §§1670,1672; Yates, Evaluative Reports by Public Officials, 30 Texas L.Rev. 112 (1951). The error promulgated by the admission of the reports of a criminal investigation and the memoranda made incident thereto was also pointed out by the Court in Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954), and in United States v. Rothman, 179 F.Supp. 935 (D.C. Pa. 1959).

It is respectfully submitted that the admission of Exhibit 22 was prejudicial error and that the government's entire case must fall if Exhibit 22 is inadmissible. The importance of Exhibit 22 to the government's case becomes apparent when the admission of Exhibit 105 is considered in the light of the fact that the foundation for the admission of Exhibit 105 was admitted to be Exhibit 22 (R. 751), and when the entire tracing process relating to the investor witnesses named in each Count hinges upon the accuracy of the unsworn statements contained in Exhibit 22 (R. 751-756).

POINT TWO

THE TRIAL COURT ERRED IN ALLOWING CORPORATE RECORDS OF CORPORATIONS WHICH DID NOT APPEAR AS PARTIES DEFENDANT TO BE ADMITTED AS EVIDENCE AGAINST THE DEFENDANTS, AFTER TIMELY OBJECTION WAS MADE, WHEN SUCH RECORDS WERE NOT MATERIAL, RELEVANT, OR COMPETENT AND WERE NOT CONNECTED TO THE DEFENDANTS IN ANY WAY AND WERE NOT ADMISSIBLE UNDER THE FEDERAL BUSINESS RECORDS AS EVIDENCE ACT, 28 U.S.C. 1732, AND NO PROPER FOUNDATION WAS LAID.

(a) THE DEFENDANTS WERE PREJUDICED BY THE ADMISSION OF THE NEVADA TRANSFER AGENCY RECORDS (EXHIBITS 28, 29, 30 AND 31).

Counsel for the defense stipulated that Exhibits 28, 29, 30, and 31 were obtained from the Nevada Transfer Agency and were part of the records of that company (R. 649). After the stipulation was made, the Court inquired whether foundation was being waived, and was informed that the foundation was not being waived (R. 649, 651). Whereupon the Court then, without further foundation, admitted the exhibits. The exhibits in question were admitted over the objection that they were not the best evidence and had no pertinence or materiality as to Howard P. Carroll or H. Carroll & Co. and were hearsay as to both defendants. The United States Attorney stated that they were being offered to establish the flow of stock of Comstock, Ltd. during the periods set forth in the indictment. No evidence was

offered to show the authenticity of the records or the manner in which the records were kept. At the time of the admission of the exhibits, the trial court was made aware of this Court's landmark decision in Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), but admitted the records in spite of the decision (R. 651). Exhibit 28 is a book of cancelled stock certificates and other documents, including transfer instructions from various parties covering the period from June 1955 through June of 1957 and containing certificates numbered 1716 to 2672, inclusive, of Comstock, Ltd. Exhibit 29 is a similar book of stock certificates and various transfer requests covering the period of July 1957 through October of 1957, and containing certificates numbered 2673 to 3290, inclusive, of Comstock, Ltd. Similarly, Exhibit 30 is comprised of certificates numbered 3291 to 3513, inclusive, of Comstock, Ltd. and is for the period of November through September of 1962.

One additional exhibit was obtained from the Nevada Transfer Company and bears the identification number of Exhibit 31. The exhibit is entitled, "Numerical Control Ledger Sheets." The exhibit, when examined, refers to many matters which are not in evidence and which have never been explained. For example, as to certificates numbered 2014, 2019, 1757, 1905, and 2501, the notation appears, "see transfer." All of these exhibits were offered as being admissible under the Business Records as

Evidence Act, 28 U.S.C.A. 1732.

No witness testified as to the authenticity of the Nevada Transfer Agency records or to the manner in which they were kept. In Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), a similar stipulation was dealt with and held to be an insufficient foundation to allow the admission of the corporate records. In Niederkrome v. C.I.R., 266 F.2d 238, 241 (9th Cir. 1958), the stipulation was set out in footnote 5:

> "5. There was a stipulation which established that the record was that of the parent company, that it was in appropriate custody and that it was the true record of the meeting which it purported to record, but this stipulation did not cure the other defects pointed out or make it competent, relevant, or material against taxpayer. See, Parish's Estate v. C.I.R., 187 F.2d 390, 395-396."

It is clear that the records of a corporation are not competent evidence against a third person to prove contracts with them in the absence of proof that they knew and assented to the records. Oregon & C. R. Co. v. Grubissich, 206 Fed. 577, (9th Cir. 1913). No such proof appears in the record to bind either of the defendants.

The Niederkrome case, supra, also quoted with approval United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944), 154 A.L.R. 272, where the Second Circuit reviewed the same problem and said that corporate books of account are not competent against a stranger merely because they are the books of the company whose dealings they purport to record. Moreover, the

records when examined are not complete and refer to matters which were not before the trial court such as "see transfer" or by other reference. Exhibit 31. No testimony was presented to show that the transactions appearing in Exhibits 28, 29, 30, and 31 represented unlawful transactions, sales or any matters which could lead or tend to show the guilt of the defendants or either of them.

Therefore, it is apparent that Exhibits 28, 29, 30 and 31 should not have been admitted.

(b) THE DEFENDANTS WERE PREJUDICED BY THE ADMISSION OF RECORDS OF CHEVRIER & CO. (EXHIBITS 18 AND 104).

Exhibit 18 and Exhibit 104 were both obtained by William Ziering from Archie Chevrier (R. 621). The records related to the account maintained by H. Carroll & Co. with Chevrier & Co. and Archie Chevrier and were taken by Mr. Ziering from a storeroom in the basement of the San Francisco Mining Exchange. Initially, Exhibit 18 included the matters that were separated and designated as Exhibit 104. No chain of custody was established as to the exhibits after they were taken by Mr. Ziering. Exhibit 18 was identified by Mr. Ziering, who was a member of the staff of the Securities and Exchange Commission and served as co-counsel with the United States Attorney in the trial of the case. He took the stand and endeavored to lay a foundation

for the admission of the exhibits by saying that they were the records of Archie Chevrier relating to H. Carroll & Co. The defendants' objection resulted in rather extended argument which brought about the following colloquy:

> "THE COURT: What does that prove, counsel? Was Mr. Chevrier a member of Comstock, Ltd., or was he a member of Carroll & Company? That's the question. How do you connect it up with the Comstock Corporation or with the Carroll & Company corporation or with the defendant Carroll?
>
> "MR. MITCHELL: The records on the face of those particular records --
>
> "MR. ERICKSON: Your Honor, I object to this in the presence of the jury, your Honor.
>
> "THE COURT: The jury will be instructed to disregard what's being said. This is not evidentiary whatsoever. This is purely a discussion for the purpose of trying to conserve time.
>
> "I think you have got to make another effort, counsel. You had better take up something else. I'm afraid I can't admit them on just that basis alone. You have to connect them in some way.
>
> "MR. MITCHELL: Connect them to Mr. Chevrier or to the defendant H. Carroll & Company and Mr. Carroll?
>
> "THE COURT: Counsel, no matter what a record may say on its face, you have to show that the records came from a source, and then connect that in some way with the defendants here. Just the fact that it states on the face something about Carroll & Company does not prove it. That's your problem, and I think you might as well find a way to do it. I think maybe you had better get busy on that this evening and take up something else in the meantime. Do not try to figure it out now. I know you wouldn't be able to. Go upstairs and talk to your associates and figure it out. Can't you take up something else now?" (R. 623-624.)

Thereafter, both exhibits were admitted. Exhibit 18 had as a foundation for its admission the testimony of Liboslav Uhlir, who was a former employee of H. Carroll & Co. He testified that he saw Exhibit 18 for the first time just before he took the stand and that the confirmation slips contained in Exhibit 18 were the type that passed across his desk when he worked for H. Carroll & Co. (R. 707). The admission of Exhibit 18 came about in this manner:

> "THE COURT: Pardon the interruption. Is this the same type of confirmation that passed across your desk?
>
> "THE WITNESS: Well, a copy of it.
>
> "THE COURT: All right, they are admitted.
>
> "MR. ERICKSON: I object. Your Honor, I would like some questions on voir dire.
>
> "THE COURT: I'll give you the privilege. I will withhold the admission until you make your voir dire questions and your objection." (R. 707.)

On voir dire, Mr. Uhlir admitted that he did not prepare any of the confirmation slips or items which he identified as Exhibit 18. He also admitted that he could not identify any one of the slips and that he did not know where the slips came from (R. 708). Thereafter, the court said:

> "I can tell you in advance, I'm going to admit them. You made your objection." (R. 710.)

The court also said that it thought that sufficient foundation had been laid to connect the exhibits with the operation of H.

Exhibit 104 was admitted when Gaither Loewenstein said, in response to the court's questions, that he had been an employee of Chevrier & Co. and that the items comprising Exhibit 104 were part of the records of Chevrier & Co. (R. 728.)

Both exhibits were admitted on the basis of the court's questions and over the defense objection that no foundation was laid and that the records of Chevrier & Co. were not material, relevant, or competent to prove any matter or issue in the case (R. 729).

Exhibit 104 contained bank drafts, notices, confirmation slips, and delivery tickets of Chevrier & Co. Transactions reflected by Exhibit 104 related to purchases by H. Carroll & Co. of Comstock, Ltd. stock, as agent, over the San Francisco Mining Exchange (R. 723). Both Exhibits 18 and 104 were woefully lacking in a foundation to establish that they were in the same condition at the time they were offered as when they were kept by Chevrier & Co. or that they were complete. The chain of custody and the foundation for both exhibits were not established. United States v. Gondron, 159 F. Supp. 691 (D.C.S.D. Texas 1958); 2 Wharton, Criminal Evidence, 11th Ed., Section 757; 20 Am. Jur., Evidence, Section 719; see also, Penden v. United States, 223 F.2d 319 (D.C. Cal. 1955).

Moreover, both exhibits were improperly admitted, if Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), has any meaning. See also, Feinberg v. United States, 140 F.2d 592 (2nd Cir. 1944).

It is respectfully submitted that the admission of Exhibits 18 and 104 prejudiced the defendants and constituted an overextension of the Federal Business Records as Evidence Act. 28 U.S.C.A. 1732.

POINT THREE

THE TRIAL COURT ERRED IN ALLOWING THE TESTIMONY OF HOWARD SILLICK TO BE ADMITTED AS TO HIS COMPUTATIONS AND AS TO ALL MATTERS CONTAINED IN EXHIBITS 105 AND 106 (CHARTS PREPARED BY HOWARD SILLICK), IN THAT FACTS AND MATERIALS WERE RELIED UPON IN THE PREPARATION OF SUCH EXHIBITS WHICH WERE EITHER NOT IN EVIDENCE OR WERE INADMISSIBLE AND WERE NECESSARILY HEARSAY AS TO THE DEFENDANTS.

FOUNDATION FOR THE ADMISSION OF EXHIBIT 105 AND EXHIBIT 106.

Exhibit 105 and Exhibit 106 were charts prepared by Howard Sillick, an accountant employed by the Securities and Exchange Commission, wherein he summarized certain exhibits and matters which he had obtained in his investigation (R. 739-777). Exhibit 105, according to Howard Sillick, was a recapitulation of certain information that he obtained from Exhibit 22 and from the Nevada Transfer Agency records (Exhibits 28, 29, 30, and 31) (R. 741). See Exhibit 104 (confirmation slips of Chevrier & Co.) (R. 729), and Exhibits 32, 33, 34, and 74 (quotation sheets on San Francisco Mining Exchange) (R. 662).

Exhibit 106 was a chart which reflected the number of shares of Comstock, Ltd. stock which was traded on the San Francisco Mining Exchange from March to June of 1957 and the number of shares of stock delivered by Chevrier & Co. to

H. Carroll & Co.

Mr. Sillick testified that the chart, which was marked as Exhibit 105, was a compilation of certain figures from the enumerated exhibits which showed the flow of stock certificates and their transfer by the Nevada Transfer Agency (R. 742). He admitted on direct examination, when questioned by the court, that he obtained the information to put on the chart from the Nevada Agency & Trust Company in response to a certain letter which he had written (R. 742). The chart was offered apparently to show the previous record owner of stock purchased by the investor witnesses named in the Six Counts of the Indictment who testified at the trial (R. 742). Thereafter, the Assistant United States Attorney admitted that Exhibit 22 was the only basis upon which a tracing could be made (R. 744) of the shares in the names of Arnold Towes, Archie Chevrier, and others, which were eventually transferred to the investor witnesses (R. 750-751).

On cross-examination, Mr. Sillick admitted that he did not know whether the matters contained in Exhibit 22 were true or false (R. 768). He also admitted that all of the figures contained on Exhibit 105 represented transactions which were executed through Archie Chevrier (R. 769). He summarized the exhibit as being a list of stock transfers which he had taken from the records of the Nevada Transfer Agency and Exhibit 22. He

also stated that in preparing Exhibits 105 and 106 certain matters had to be clarified and that he had written to the Nevada Agency & Trust Company for information which he had used in his compilation (R. 770-771). Upon the admission being made that documents not in evidence were used in the preparation of Exhibits 105 and 106, a motion to strike both exhibits was made and denied (R. 771).

Exhibit 106, Mr. Sillick said, was a chart that he prepared from Exhibits 32, 33, 34, and 79 (San Francisco Mining Exchange quotation sheets for the months of March, April, May, and June of 1957, showing the bid and asked price for Comstock, Ltd. stock and the number of shares of stock sold on the Exchange on each day during the period), and Exhibit 104 (records of Chevrier & Co.) (R. 761). Mr. Sillick said that Exhibit 106 indicated the number of shares purchased on the San Francisco Mining Exchange (R. 756-757), and that the information relating to the transfers was given to him by Mr. Ziering (R. 757), and caused the court to say:

> "You just testified that you got these from these exhibits. Now you are saying you got it from Mr. Ziering." (R. 758.)

In response to the court's question, he also said:

> "Most of these figures [on Exhibit 106] were obtained from compilation -- the compilation of these figures was obtained from a list given to me by Mr. Ziering." (R. 758.)

He said that some of the information was obtained from the delivery tickets of Chevrier & Co. which were made out to H. Carroll & Co. and were obtained in Exhibit 104 (R. 758).

Both exhibits were admitted over objection. The objection to the admission of the exhibits in question was that no proper foundation was laid for their admission and both exhibits were incompetent and immaterial as to the defendants on trial (R. 575, 763, 768).

EXHIBIT 105.

In considering the particular disadvantage that a defendant must face when charged with an economic crime of the type in issue, it is necessary to determine just what the limitations are in the use of a chart and summary such as Exhibit 105.

In Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954), the defendant Hartzog was convicted of the criminal evasion of income taxes. The question before the Court of Appeals was whether the admission of work sheets of two government agents prejudiced the defendant. One agent died and the other based his work sheets partly on the work of the other. In reversing, the court found that prejudicial error occurred when part of the records relied upon for conviction were based on hearsay and were not admissible. In the Hartzog case, the government claimed that the evidence was admissible under 28 U.S.C.A. 1732 or 1733, but the court held that the preparation of the exhibit

in question was for the purpose of trial and said, speaking through Judge Dobie:

> "The legislative history of Section 1732 gives ample support to the construction of the section. See Sen. Rep. No. 1965, 74th Cong. 2d Sess. (1936). This section was enacted to provide a relaxing of the strict commonlaw rule requiring identification of book entries by all parties making them. It is clear that Congress did not intend to do away with the requirement that the record to be admissible, must carry with it some guarantee of trustworthiness. See Gordon v. Robinson, 3 Cir., 210 F.2d 192; Hoffman v. Palmer, 2 Cir., 129 F.2d 976, affirmed 318 U.S. 109, 63 S. Ct. 477, 87 L.Ed. 645.
>
> "On the record presented to us, it does not appear that the worksheets prepared by Baynard were prepared under such circumstance as will provide a guarantee of worthiness. These worksheets were made in preparation for this prosecution; they were Baynard's personal working papers, were the product of his judgment and discretion and not a product of any efficient clerical system. There was no opportunity for anyone, especially Berlin, to tell when an error or misstatement had been made. These worksheets were no more than Baynard's unsworn, unchecked version of what he thought Hartzog's records contained. Applying the criterion of the Hoffman case, that admissibility is to be determined by 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation,' 318 U.S. at page 114, 63 S.Ct. at page 480, we hold that these worksheets were inadmissible as evidence of the truth of their contents. (Citing cases.)" Hartzog v. United States, 217 F.2d 706, 710 (4th Cir. 1954).

Thus, without factual testimonial foundation, Exhibit 105 cannot stand.

It cannot be questioned that the use of a summary is proper, but all evidence used in the preparation of the summary must be before the Court and available to counsel at the time the expert

accountant or witness offers his testimony regarding the exhibit.

In Corbett v. United States, 238 F.2d 557 (9th Cir. 1956), the use of a chart and summary was upheld where no question was raised as to the correctness of any material used by the expert. There, in stating the requirements by way of foundation and the limitation on the use of charts, Judge Tolin said:

> "Computation and summaries by expert accountants has long been allowed for the use of juries in this type of case. It was specifically approved by the Supreme Court in United States v. Johnson, 319 U.S. 503, 63 S. Ct. 1233, 87 L.Ed. 1546. Among safeguards which must be applied are procedural methods which bring before the jury the basic evidence which is summarized; also, that broad scope of cross-examination be permitted in order that the accuracy of the accountant's summary may be tested. It must be made clear to the jury that such testimony and charts are but summaries of other evidence and that the jury should examine the basis upon which summarization rests, for it is not primary evidence at all, but, instead, a gathering together an accounting classification of primary evidence." Corbett v. United States, 238 F.2d 557, 558. See also, Noell v. United States, 183 F.2d 334 (9th Cir. 1950).

It is thus clear that if Exhibit 22 was improperly admitted, Exhibit 105 was not properly admitted in evidence. As to the weight that the jury gave to the Exhibit, we can but speculate. An examination of Exhibit 105 will show that there are also other deficiencies in the chart. Consider, for example, the Johnson transaction where reference is made on Exhibit 105 to Exhibit "A," which was not identified by Howard Sillick. Consider also the fact that Certificate No. 2713 is not set out on

Exhibits 22 or 27 and does not even appear in the Nevada Transfer Agency ledger (Exhibit 31) and must, therefore, be hearsay.

The summary made by Sillick as to Willard and Margaret Johnson leaves the date blank, provides a certificate number, and then says "refer Exhibit A." The only Exhibit "A" which is in evidence is a license to remove and cut timber, which could not possibly give a tracing right to Certificate No. 2713, and thus again adds to the frailty of Exhibit 105.

A further objection exists inasmuch as the notation appears opposite Archie Chevrier that a certificate for 50,000 shares exists, with the notation "Ctf. not recorded," and must necessarily have been based on exhibits not in evidence or hearsay.

The Securities and Exchange Commission expert, Howard Sillick, said that Exhibit 105 was prepared by the compilation of data taken from Exhibit 22, Exhibit 104, and Exhibits 28, 29, 30, and 31 (R. 741). If any of the exhibits were admitted erroneously, Exhibit 105 cannot stand. It is clear that the admission of Exhibit 22 was error, and an analysis of Exhibits 28, 29, 30, and 31 (also admitted in error) will show that the exhibits in question could not provide the information which Howard Sillick used to prepare Exhibit 105.

It is respectfully submitted that the summary was based on matters not in evidence and gave a badge of authenticity

to a compilation of inferences and the inadmissible conclusions of Howard Sillick as to a tracing of stock to the investor witnesses named in the indictment.

EXHIBIT 106

Exhibit 106, prepared by Howard Sillick, contains two columns; the first of which is entitled, "Number of Shares Traded on San Francisco Mining Exchange," and the second bearing the caption "Number of Shares Delivered by Chevrier to Carroll & Co." Mr. Sillick testified that he determined the number of shares traded over the San Francisco Mining Exchange from March to June of 1957 by summarizing Exhibits 32, 33, 34, and 79. It is too plain for cavil that the summary of the transactions on the San Francisco Mining Exchange were not all connected to the defendants and were, therefore, immaterial, in large part.

Moreover, the "Number of Shares Delivered by Chevrier to Carroll & Co." in the right hand column can have no relevancy or materiality, for delivery in the securities business is not synonymous with sale or purchase. An examination of Exhibit 104 will disclose that the majority of the purchases made by H. Carroll & Co. were not for the account of H. Carroll & Co., but only purchases made for others.

The confirmations from which Exhibit 104 was prepared acknowledge both purchases through A. H. Chevrier & Co. by

H. Carroll & Co., and in an isolated instance, a sale by H. Carroll & Co. to A. H. Chevrier & Co. The material portion of Exhibit 104, as it relates to the transaction in question, is the confirmations by Chevrier & Co. to H. Carroll & Co. Significantly, each of these confirmations shows that shares of stock of Comstock, Ltd. were "bought for your account and risk" as "agent." It is impossible to determine from the confirmations from A. H. Chevrier & Co. to H. Carroll & Co. whether or not H. Carroll & Co. was purchasing for its own account or for the account of another as agent. Some of the items appearing on Exhibit 104 appear by way of reciprocal confirmations which are reflected in Exhibit 18. (Confirmations of H. Carroll & Co. taken from records of A. H. Chevrier & Co.) An analysis of Exhibit 104 discloses that approximately 88,000 shares of stock of Comstock, Ltd. were either purchased or acquired for the accounts of others by H. Carroll & Co. (Exhibit 18 shows a total of 88,200 shares, whereas Exhibit 104 totals 88,000 shares.) Out of the 88,200 shares reflected in Exhibit 18, only 12,500 shares were acquired as principal. The balance of 75,700 being "bought from you [Chevrier & Co.] as broker [agent] for buyer," or "We confirm purchase through you as agent," or, in two instances, "Sold for your account as agent. In this transaction we are acting as agent of both buyer and seller." Thus, it is apparent that the materiality of both Exhibits 104 and 106 must be questioned.

A careful examination of Exhibit 106 and Exhibit 104 will disclose another reason why the exhibit should not stand. Exhibit 106, according to testimony offered by Mr. Howard Sillick, was prepared only from evidence which had been previously admitted by the court. Exhibit 104 was the only evidence from which the delivery of stock of Comstock, Ltd. to H. Carroll & Co. by Chevrier & Co. could be ascertained.

In reviewing the delivery tickets in Exhibit 104, it becomes apparent that the figures appearing in the right hand column of Exhibit 106 cannot be correlated with Exhibit 104. Exhibit 106 was obviously prepared, as Mr. Sillick testified, from figures given to him by Mr. Ziering. A recapitulation of Exhibit 104 will show:

No. of shares delivered
By Chevrier to Carroll & Co. (Taken from Exhibit 104)

March	40,500	
April	27,500	
May	17,000	
June	2,000	87,000

and the figures reflected on Exhibit 106 in the right hand column as the number of shares delivered by Chevrier & Co. to Carroll & Co. were, according to Howard Sillick:

No. of shares delivered
By Chevrier to Carroll & Co.

March	45,500	
April	23,500	
May	16,000	
June	3,000	88,000

In reviewing the record, it must be determined whether the combined effect of the admission of the exhibits complained of substantially prejudiced the defendants' rights and led to their conviction. Todorow v. United States, 173 F.2d 439 (9th Cir. 1949), cert. denied, 337 U.S. 925, 69 S. Ct. 1169, 93 L.Ed. 1733.

Whether the defendants were prejudiced depends in part on the strength or the weakness of the government's case. Where evidence of guilt is largely circumstantial, as it was in this case, and the proof of guilt is not strong, the court cannot disregard error in admitting the exhibits as harmless. Thomas v. United States, 281 F.2d 132 (8th Cir. 1960); Thomas v. United States, 287 F.2d 527 (5th Cir. 1961).

It is respectfully submitted that the admission of Exhibit 106 was plain error and substantially prejudiced the defendants.

POINT FOUR

THE DEFENDANTS WERE PREJUDICED WHEN THE UNITED STATES ATTORNEY CONTINUALLY AND REPEATEDLY ASKED LEADING QUESTIONS TO EVERY PROSECUTION WITNESS, OVER THE COURT'S WARNING AND AFTER CONTINUED AND REPEATED OBJECTIONS WERE MADE.

David R. Alison was the first witness to be called on behalf of the government (R. 76). After a difficult start in which the court was required to object to the method of questioning by the Assistant United States Attorney (R. 86) and in which the court commenced its participation as an advocate in the trial (R. 91), a series of questions terminated in the statement by the court:

> "Now, counsel, take over." (R. 92.)

With this shaky beginning, an early objection to a question as leading was made by counsel for the defendants and was, in effect, sustained (R. 93). Early in the trial, and due to the court's apparent interpretation that a prosecution witness was adverse, without request by the government, and again after objection was made to leading questions, the court stated as follows:

> "Well, I am going to permit him to lead this witness. In fact, I am going to cross-examine the witness on the showing thus far. You may cross-examine this witness." (R. 120.)

Leading questions were thereafter asked to each and every succeeding witness. Examples of comments of the court as they

related to leading questions and their relationship to the trial appear throughout the transcript, some of which are as follows:

> "Counsel, you are leading him all over the lot." (R. 526.)
>
> "Counsel, you lead terribly." (R. 583.)
>
> "The thing that is bothersome in the case is that there is so much leading and suggestive interrogation that I had difficulty in determining whether it is the evidence of the witnesses or not . . . . And much of this evidence I am absolutely in doubt at this time as to whether or not it is the suggestion . . . . But the leading of the witness was such that I do not know whether his answers were his own testimony or whether he was just adopting the leading questions." (R. 829.)
>
> "I never dreamed a case could be so mixed up." (R. 842.)
>
> "The way the evidence has gone in this case because of the leading questions, it raises questions in my mind whether it is the testimony of the witness or whether it is the suggested testimony." (R. 847.)

Counsel for the defense on many occasions, as has been noted, objected to questions as being leading and suggestive, which objections were oftentimes overruled (R. 706). The use of leading questions, together with the right to cure an abuse which arises out of improper questions, lies within the discretion of the court, and only when an abuse is made of that discretion will the matter be considered on appeal. Gill v. United States, 285 F.2d 711 (5th Cir. 1961).

In this case, leading questions were asked to the extent that the court itself was unable to precisely determine whether or not the testimony of the witnesses was being presented or whether the testimony was simply that of the Assistant United States Attorney. Also, as a result of such questions, the court itself determined that it was necessary to interrogate many witnesses, thereby giving more weight to the questions asked by the court and the answers given than would have been given to the same questions and answers had the court not intervened. See United States v. Fry, 304 F.2d 296 (7th Cir. 1962), where similar intervention by the court was held to be prejudicial to the defendant. Inasmuch as the court was in doubt as to the state of the record as it related to testimony of witnesses, the record itself could thus not support the charge, since, as a matter of law, such doubt should be resolved in favor of the defendants.

It is respectfully submitted that the trial court erred and substantially prejudiced the defendants by not restricting the continued use of leading questions and by not requiring the United States Attorney to allow each witness to tell his own version of the complicated and disputed factual controversy before the court.

POINT FIVE

THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANTS' MOTION FOR A JUDGMENT OF ACQUITTAL AS TO COUNTS ONE, FIVE, AND SIX OF THE INDICTMENT, IN THAT THE EVIDENCE PRESENTED AND THE CHARGES MADE IN THE INDICTMENT RELATING TO SUCH COUNTS WERE BARRED BY THE STATUTE OF LIMITATIONS. 18 U.S.C. 3282.

The evidence presented, as it relates to Count One, Paragraph 4, and Counts Five and Six, is ineffective to prove a crime by reason of the statute of limitations. Title 18, U.S.C. 3282, provides as follows:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." (As amended September 1, 1954.)

In Count One, Paragraph 4, as well as in Counts Five and Six, the jurisdictional allegations charge the use of the mails in the delivery of stock certificates, after sale and payment.

The offenses alleged in the six Counts of the indictment relate to fraud in the sale of securities (Section 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. § 77q(a)). The Act referred to makes certain matters unlawful "in the offer or sale of any securities" by the use of Federal jurisdictional means.

Count One purchaser, Mr. Wisda, purchased stock as was evidenced by a confirmation sent to and received by him (Exhibit 54) dated May 7, 1957 (R. 583). Mr. Wisda's check in payment for such stock was sent to the defendant company on May 10, 1957 (Exhibit 55) (R. 583, 589). Thus, a completed purchase and sale, to include an offer, acceptance and payment, occurred more than five years prior to the date on which the indictment was found. The only matter remaining to be done was the delivery of the stock certificate as evidence of ownership of the shares purchased. A receipt sent by Mr. Wisda to the defendant company, dated May 31, 1957 (Exhibit 56) (R. 585,589) acknowledged that a stock certificate in the name of Mr. Wisda (Exhibit 94) (R. 584, 585) had been received. There is no testimony establishing a date on which the certificate was sent or received, or by whom it was sent.

Mr. Bloemsma, Count Five purchaser, remembered nothing relating to his stock purchase himself. The evidence relating to Mr. Bloemsma's purchase consisted of a stipulation that Mr. Bloemsma purchased 500 shares of Comstock, Ltd. stock on April 10, 1957. Such stock was paid for (Exhibit 95) (R. 602), a stock certificate was received (Exhibit 96) (R. 602), a receipt was sent and an envelope was received (Exhibits 66 and 67) (R. 602).

Count Six purchaser, Mr. Indorff, identified an order blank dated May 6, 1957 (Exhibit 58) (R. 595), and also a receipt for

payment for such shares dated May 6, 1957(Exhibit 59)(R. 593). Thereafter, and within the five-year period, a stock certificate (Exhibit 64) (R. 597) was delivered through the mails to Mr. Indorff in an envelope (Exhibit 60) from H. Carroll & Co. (R. 594). A receipt for stock in the name of Robert W. and Robaday I. Indorff (Exhibit 61) (R. 594) was also received in evidence (R. 595) without any testimony as to what was done, if anything, with the receipt. An unrelated "customer data slip," as well as an unused envelope, were also placed in evidence (Exhibits 62 and 63) (R. 596).

The Securities Act of 1933, as amended, assists in interpreting what might be an "offer forsale" by defining the term "sale" in another section of the Act (Section 2(3) of the Securities Act of 1933, as amended, 15 U.S.C. § 77b(3)). This definition of "sale" and "sell" includes the terms "offer to sell" and "offer for sale" or every attempt thereof of any security or an attempt to dispose of a security for value. There would be no question that once a sale has been completed by offer and acceptance, and payment has been made, that the violation, if any, had been completed. Use of the mails thereafter simply provides the requisite Federal jurisdictional basis. In each instance, as recited above, the offer, acceptance, as well as payment, and thus the sale, to include the offer for sale of the security in question, was completed more than five years

prior to the date on which the indictment was found, and any prosecution on such Counts must necessarily be barred by the statute of limitations (Title 18, U.S.C. 3282).

In actions under Section 17(a) of the Securities Act, 15 U.S.C., § 77q(a), Professor Loss, at page 1521 of his text, "Securities Reg.", states:

> ". . . [T]he Government has always taken the position that the gist of the offense there is the fraud rather than the jurisdictional means."

The majority view, as established by a legion of cases, is that the use of the mails confers federal jurisdiction or in one case may be used to establish venue. See Schillner v. H. Vaughn Clarke & Co., 134 F.2d 875 (2d Cir. 1943); United States v. Cushin, 281 F.2d 669 (2d Cir. 1960); and United States v. Hughs, 195 F. Supp. 795 (S.D. N.Y. 1961). In the Cushin and Hughs cases, a distinction was made between fraud under the Securities Act and under the mail fraud statute, whereas in the former, the purpose of the mailing requirement is to confer federal jurisdiction, and in the latter the act of mailing is punishable.

The sending of a certificate evidencing ownership was in itself lawful, and, while conferring jurisdiction, is only incidental to the alleged crime. No offers, promises, or representations were made subsequent to the date payment was made. The sending of the certificate was at most entirely incidental

to the alleged scheme and not a part of it. See Getchell v. United States, 282 F.2d 681 (5th Cir. 1960). Delivery is not an element of the alleged crime, nor is it essential "to constitute punishable crime." See United States v. Schneiderman, 106 F. Supp. 892 (D.C. Cal. 1952). Surely, after an agreement is made to buy and sell and payment is made, the statute must begin to run, for it would be absurd to state that if delivery is never made the statute would be forever tolled.

In the security business, possession is not necessary for sale of stocks purchased. All brokers will sell, based upon a showing of a confirmation, which is evidence of purchase. Further, a sale of personal property is good between the parties without delivery. See Drescoll v. Drescoll, 143 Cal. 521, 77 Pac. 471 (1904); and Burkett v. Doty, 32 C.A. 337, 162 Pac. 1042 (1917).

The statute of limitations begins to run when the offense was complete. See Pendergast v. United States, 317 U.S. 412, 63 S. Ct. 268, 87 L.Ed. 368 (1942). The statute of limitations began to run when the Communist Party came into being in Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed.2d 356 (1957). In United States v. Schneiderman, 106 F. Supp. 892 (D.C. Cal. 1952), Judge Mathes stated:

> "Moreover, even though there may be a continuous agreement, as soon as an act is done 'to effect the object' of that agreement the crime of conspiracy is

complete and an indictment for that offense must be found 'within three years next after such offense shall have been committed' . . ." United States v. Schneiderman, 106 F. Supp. 892, 896 (D.C. Cal. 1952).

The object of a fraudulent sale is obviously to be paid, and when paid, the crime is complete. See also Kann v. United States, 323 U.S. 88, 65 S. Ct. 148, 89 L.Ed. 88 (1944), where it was said:

> ". . . the scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud, and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it." Kann v. United States, 323 U.S. 88, 95, 65 S. Ct. 148, 151, 89 L.Ed. 88, 96.

Statutes of limitation are clearly a substantive right which create a bar to prosecution and are to be liberally construed in favor of a defendant. See United States v. Gatz, 109 F. Supp. 94 (D.C. N.Y. 1952). The purpose of statutes of limitation in criminal cases is not only to bar prosecutions on aged and untrustworthy evidence, but it also serves to cut off prosecution for crimes a reasonable time after completion, when no further danger to society is contemplated from the criminal activity according to United States v. Bonanno, 177 F. Supp. 106 (D.C. N.Y. 1959) (rev. on other grounds, 285 F.2d 408 (2nd Cir. 1960)).

The Indictment herein was found on May 23, 1962. All mailings or other transactions, with the exception of the delivery of stock certificates after payment and sale, as alleged in

Paragraph 4, Count One, and in Counts Five and Six, occurred prior to May 23, 1957. Actions on such counts are clearly barred by 18 U.S.C. 3282.

Isolated cases have said that "the gist of the claims is the use of the mails. . . ." United States v. Guterma, 189 F. Supp. 265 (S.D. N.Y. 1960). However, even in the Guterma case, the court held that it was necessary that "the mails are used in execution" of the crime. The mere mailing of a stock certificate for delivery after a sale was completed is only incidental and not "in execution" of the crime. No evidence exists that the defendants sent or caused to be sent any false or misleading material to any of the investor witnesses through the mails, and under any interpretation Counts One, Three, and Five must fail.

It is respectfully submitted that Counts One, Three, and Five should have been dismissed.

POINT SIX

THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO STRIKE THE SURPLUSAGE APPEARING IN THE INDICTMENT AND THEREBY PREJUDICED THE DEFENDANTS.

The Six-Count Indictment returned against the defendants provided in Paragraphs 2 and 3 the following charge which included generic and indefinite references to acts of the defendants that were the subject of the defendants' motion to strike. The complained of portions of the respective paragraphs appear below, with emphasis supplied:

> "2. The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., made and caused to be made untrue, deceptive and misleading statements of material facts, including the following:
>
> "(a) That the stock of Comstock, Ltd. was being offered and sold at the market price.
>
> "(b) That Comstock, Ltd. operated a quicksilver mine in Cloverdale.
>
> "(c) That Comstock, Ltd.'s course was being chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record.
>
> "(d) That Country Club Charcoal Corporation was on the verge of fantastic profits; and other
>
> similar untrue, deceptive and misleading statements of material facts, all of which the defendants well knew to be false, fraudulent and misleading.

"3. The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., omitted to disclose to investors material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, including the following:

"(a) That there was no free and open market for the shares of Comstock, Ltd., and that the then existing price at which such stock was sold by H. Carroll & Co., was maintained, dominated and controlled by the defendants Howard P. Carroll and H. Carroll & Co.

"(b) That the major part of the shares of Comstock, Ltd. sold to investors by the defendants was obtained at 25 cents per share from a block of 500,000 shares of Comstock, Ltd., placed in a Denver, Colorado, escrow account.

"(c) That Country Club Charcoal Corporation had never made any profits and had not paid off debts incurred prior to its merger with Comstock, Ltd.

"(d) That the Cloverdale quicksilver mine had been shut down in November or December of 1956.

"(e) That Comstock, Ltd.'s course was not chartered by Colonel Gillenwaters.

"(f) That the projected profit per month for 1957-1958 for Comstock, Ltd. of $51,765.00 was an estimate for the future, having no valid or substantial basis in fact."

Rule 7(d), Federal Rules of Criminal Procedure, grants unto the court the right to strike surplusage from an indictment.

In United States v. Pope, 189 F. Supp. 12, 25, 26 (D.C. S.D. N.Y. 1960), the court made it clear that the words "among other things," as they appeared in the counts therein, "give the

defendants no further information with respect to them." The court goes further and states:

> "But the vice goes beyond mere failure to inform. The Grand Jury under the Constitution is the accusatory body in felony offenses. To permit the allegation to remain would constitute an impermissible delegation of authority to the prosecution to enlarge the charges contained in the indictment." United States v. Pope, 189 F. Supp. 12, 25, 26 (D.C. S.D. N.Y. 1960).

Therefore, it is respectfully submitted that the trial court erred and prejudiced the rights of the defendants by not striking the generic language complained of.

POINT SEVEN

THE TRIAL COURT ERRED IN ALLOWING RALPH FRANK TO TESTIFY, AFTER TIMELY OBJECTION, AS TO A TELEPHONE CALL WITH WARD DAWSON, WHICH WAS MADE OUT OF THE PRESENCE OF THE DEFENDANTS AND WAS NOT CONNECTED TO THE DEFENDANTS IN ANY WAY.

Ralph R. Frank, an attorney who had represented both H. Carroll & Co. and Howard P. Carroll, as well as Comstock, Ltd., was called as a prosecution witness (R. 672-698). As a part of Mr. Frank's testimony, the government elicited from him information allegedly acquired during the course of a telephone conversation with H. Ward Dawson, who once served as counsel for David Alison (R. 684). Admittedly, Mr. Frank was not familiar with the telephone voice of H. Ward Dawson (R. 684). The conversation was not in the presence of any of the defendants and was objected to on the basis of hearsay. The objection was overruled and deemed not to be within any privilege that might exist between H. Carroll & Co. or Howard P. Carroll and Ralph Frank, who had represented them.

The conversation in question related to the brown brochure and the attempts made by Mr. Frank to clear it with the California Corporation Commission (R. 684) and various other matters relating to H. Ward Dawson's thoughts and questions relating to Comstock, Ltd. and its operation. The obvious hearsay nature of such testimony hardly needs a citation or authority.

Hearsay evidence is a term applied to "that species of testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others." Black's Law Dictionary, 3rd Ed., 1933. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). In short, it is second-hand evidence, as distinguished from original evidence. Thus, the testimony of Mr. Frank, as to what was said to him by H. Ward Dawson, out of the presence of the defendants, was obviously hearsay. The fact that the information came over a telephone conversation when Mr. Frank admitted that he did not know the voice of Mr. Dawson, adds to its inadmissibility. Hearsay evidence is the most untrustworthy of all types of evidence and should not be allowed to stand in supporting a conviction. Gaines v. Relf, 53 U.S. 472 (1851); The Hurricane, 2 F.2d 70, aff'd. C.C.A., 9 F.2d 396 (1925); McCormick, Evidence, § 225 (1954).

It is respectfully submitted that the admission of the testimony of Ralph Frank as to his conversation with H. Ward Dawson, out of the presence of the defendants, was error and prejudiced the rights of the defendants.

POINT EIGHT

THE COURT ERRED IN ADMITTING EXHIBIT 1 AFTER TIMELY OBJECTION WAS MADE.

Exhibit 1 was first considered when presented to Mr. Alison, the prosecution's initial witness. Mr. Alison testified that on or about January 1, 1957, certain documents were executed by him and others (R. 84). The documents referred to, according to Mr. Alison who recognized the signatures thereon, were signed by the various persons whose signatures appeared thereon (R. 87, 88). Apparently the documents consisted of promissory notes which were issued for the purpose of payment of the purchase price of a total of 500,000 shares of Comstock, Ltd. (R. 89). This is not absolutely clear from the testimony, but may be inferred from the testimony. The notes were given to Mr. Chevrier, who thereafter delivered the stock which was purchased thereby to Mr. Dawson (R. 156). The notes were never tied to either of the defendants in this case, were necessarily hearsay, and could not possibly have been material. Not only that, but thereafter an additional note, not offered in evidence, was substituted for the initial notes, which note was a personal note of Mr. Allison's (R. 156). Mr. Alison further testified that he had not paid on the note and that "I owe it all, I guess." (R. 157).

Exhibit 1 was not offered at the time that Mr. Alison testified as to matters relating to its execution. When Mr. Dawson was on the stand, he testified simply that the notes had been drawn by him (R. 390). Upon the offer of these notes at that time, objection was made as to materiality and as to Mr. Alison's statement that a new note was substituted in lieu thereof, and, also, that the notes would necessarily be hearsay as to the defendants. Notwithstanding these objections, the court admitted the exhibit in evidence (R. 391).

POINT NINE

THE TRIAL COURT DENIED THE DEFENDANTS A FAIR TRIAL BY CONSTANTLY AND CONTINUOUSLY INTERRUPTING THE WITNESSES TO PROPOUND THE COURT'S OWN QUESTIONS AND IN CONSTANTLY ASSISTING THE UNITED STATES ATTORNEY IN THE PRESENTATION OF THE PROSECUTION'S CASE.

Throughout the trial the court continually assisted the prosecution in this case by asking, both on direct and cross-examination, a substantial number of questions. The total number of questions which the trial court directed to the prosecution witnesses in this relatively short trial exceeded 450. In addition thereto, the court gave assistance to the prosecution to such an extent that the likelihood existed that the jury would determine that the court had passed the level of disinterest. Judge Hand, in United States v. Marzano, 149 F.2d 923 (2nd Cir. 1945), stated:

> ". . . Moreover, even if the jury were not as likely as seems to us to be the case, to have so understood what took place, the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the list; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge. Adler v. United States, 5 Cir., 182 F. 464,472-474; Connley v. United States, 9 Cir., 46 F.2d 53, 55-56; Frantz v. United States, 6 Cir., 62 F.2d 737, 739; Williams v. United States, 9 Cir., 93 F.2d 685, 690, 691; United States v. Minuse, 2 Cir., 114 F.2d 36, 39." United States v. Marzano, 149 F.2d 923, 926 (2nd Cir. 1945).

The court in this case continued to not only assist the government, but to make reference to its participation. For example, the court, after propounding questions to the first government witness, instructed counsel for the government to take over (R. 92). Only minutes later, and to the same witness, the court stated:

> "Well, I am not supposed to try the case, counsel, but I'll ask him." (R. 100.)

At the commencement of the second day of trial, the court stated to the Assistant United States Attorney:

> "But I am forewarning you now that I am going to take over from now on if you don't get down to business." (R. 233.)

It is obvious that in the court's opinion the Assistant United States Attorney did not thereafter "get down to business" and the court did, in fact, "take over," as is evidenced not only by the questions propounded by the court, but also by the following statements of the court:

> "Now let me say this, counsel for the government, you see, it is really unfair for me to have to be constantly correcting the procedure on the part of the government, because it places the defendants' counsel in a rather difficult position. He probably doesn't want to be continually objecting." (R. 448.)

> "Counsel, let's move along today. Do not make it necessary for me to embarrass myself and you, too, on these questions. . . ." (R. 455.)

> "The proper way to do that is to ask him if it is his signature and start from there." (R. 526.)

"Even after I suggested it, and I shouldn't really do it, you don't offer it. It is admitted in evidence." (R. 527.)

"That is the saving question, counsel." (R. 557.) [This statement of the court was made after the court asked the witness a question on direct examination.]

"I really thought I had given up the practice of law, but I am beginning to believe that I am just starting over again." (R. 671.)

"I give you a little assistance, then you just quit entirely. You expect me to do the whole job. I am not supposed to try the case, counsel." (R. 707.)

"You ought to show that he at least knew that he had records, that they were kept, and lay the foundation. Let me do it." (R. 728.)

"I have practiced about all the law I am going to practice in this case from now on and, frankly, I believe I have almost anticipated [sic] [participated in] the trial of the case as a lawyer." (R. 786.)

"I didn't know I was trying the government's case. I was to an extent, I guess." (R. 854.)

And, finally, at the completion of the trial and after the jury had returned its guilty verdict, the court said:

"I want to forewarn the government, however, that I am not going to continue doing the practice of the law that I have done in this case." (R. 1024.)

In Williams v. United States, 93 F.2d 685 (9th Cir. 1937), consideration was given to circumstances not dissimilar to this case. The Court stated:

"Our own examination of the record has convinced us that by far the major portion of the 200-page examination conducted by the District Judge--when such examination dealt with more than formal or preliminary matters--tended to aid the prosecution in proving its material contentions.

> Rare indeed were the instances in which the trial court came to the rescue of the defense. The court's insistent efforts to connect the appellants with the books and literature of the Hollywood Dry Corporation; its frequent and unnecessary interruptions of both direct and cross-examinations that were being competently conducted; and its lengthy and inquisitorial cross-examination of the defendants, including the appellants themselves, all tended, we think, to convey to the jury--though no doubt inadvertently--the impression that the court was insisting upon a conviction.
>
> "The prejudicial effect of protracted questioning of witnesses by the trial judge, and the handicaps under which counsel labor in coping with such a situation, have been repeatedly emphasized in the decisions." Williams v. United States, 93 F.2d 685, 690 (9th Cir. 1937).

The Supreme Court of the United States, in considering participation of the trial judge in the trial itself as it relates to a fair trial by standard and appropriate procedure, stated in Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L.Ed. 350 (1946):

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out by the evidence, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> "Accordingly, we cannot treat the manifest misdirection of the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U.S.C. § 391, 28 U.S.C.A. § 391." Bollenbach v. United States, 66 S. Ct. 402, 406.

Additionally, in United States v. Fry, 304 F.2d 296 (7th Cir. 1962), which reviewed the participation by the trial judge

in the trial of the case and cited Bollenbach v. United States, supra, the court stated:

> ". . . It is sufficient to point out that the record shows that in the course of a six and one-half days' trial the court asked a total of 1,210 questions of the witnesses both during direct and cross-examination. . . .
>
> "After an examination of the entire record of the trial, we are forced to the conclusion that the cumulative effect of the trial judge's constant and extensive questions of the witnesses and his occasional remarks was to destroy the required atmosphere of impartiality.
>
> "Whether the evidence offered by the government of defendant's guilt indicates that he is guilty as charged is irrelevant to the separate issue whether he received a fair trial. United States v. Salazar, 2 Cir., 293 F.2d 442; Cf. Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L.Ed. 350." United States v. Fry, 304 F.2d 296, 298 (7th Cir. 1962).

See also Gomila v. United States, 146 F.2d 372 (5th Cir. 1944), where the court stated:

> ". . . We have had occasion heretofore to comment upon the conduct of the trial judge in taking over and examining witnesses under examination by respective counsel, and his comments in the presence and hearing of the jury. In Adler v. United States, 5 Cir., 182 F. 464, 472, we said: . . .
>
> "'A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the court.'

"In Hunter v. United States, 5 Cir., 62 F.2d 217, 200, we again said:

"'The assignments of error based on the district judge's cross-examination of appellant are in our opinion well taken. While that method of cross-examination, if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any questions he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in Adler v. United States, 5 Cir., 182 F. 464. . . . It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial. . . .'

"In Williams v. United States, 9 Cir., 93 F.2d 685, the Ninth Circuit Court, as set forth in the syllabus, held:

"'The harm done when the trial judge departs from that attitude of disinterestedness which is the foundation of a fair and impartial trial is not diminished because the judge so acts by reason of unrestrained zeal or through inadvertence and is not intentionally unfair.'" Gomila v. United States, 146 F.2d 372, 374 (5th Cir. 1944).

Even with the court's participation in the trial, the evidence and testimony were in such a state that the able and experienced court was unable to follow the proceedings and was in a state of confusion, as is shown by statements of the court which follow:

"Counsel, I am going to admit the thing. Leave it stand admitted and leave it to the jury to decide. I must say this is certainly confusion." (R. 775.)

"I am beginning to get a little confused myself." (R. 778.)

"The way the evidence has gone in in this case it is almost impossible for the court to correlate the evidence." (R. 813.)

"It is more than that, but the problem is that it has been drawn in in such a piecemeal way and in such a confused way that it may be that the jury will have some problems with it." (R. 813.)

"The way this case has gone in, it is a real problem." (R. 818.)

"The way this case came in in its hacksaw fashion I wouldn't be surprised if you haven't forgotten some of it yourself, counsel." (R. 820.)

". . . [T]he evidence goes in in such a fashion that, frankly, even the court is confused." (R. 823.)

An example of the nature of the confusion which must have existed in the minds of the jury as it admittedly existed in the mind of the court relates to payment to a printer for the printing of a report for the stockholders of Comstock, Ltd. (R. 519). Repeated efforts were made by the Assistant United States Attorney to establish that such payment was made by the defendants. This effort was without success. The only evidence relating to any payment was that Kenneth Raetz, who was a public relations man, was employed to perform certain services for the defendant company of the type described in Exhibit 4 (R. 522-524) and that he was paid a certain sum as an advance against such services (R. 522, 541). No testimony

exists that this payment was made for the purpose of paying the printing bill. However, due to the "hacksaw fashion" in which the evidence was presented, the court mistakenly concluded that the payment was made by the defendants in stating:

> "If Carroll paid for the printing of these exhibits, the same as Exhibit 3, what difference does it make how much he paid?" (R. 536.)

Again, the court was mistaken in stating:

> "I ask you - you have already proved that he paid for the merchandise, that he got money from the Defendant. What else do you want?" (R. 548.)

It is respectfully submitted that the trial judge committed error by participating in the trial and by evidencing his belief in the guilt of the defendants by assisting the prosecution in the presentation of the case on trial.

POINT TEN

THE TRIAL COURT PREJUDICED THE RIGHTS OF THE DEFENDANTS AND DENIED THE DEFENDANTS A FAIR TRIAL BY REQUIRING DEFENSE COUNSEL TO MAKE LEGAL ARGUMENTS ON THE ADMISSIBILITY OF EVIDENCE IN THE PRESENCE OF THE JURY.

From the very inception, the court presumed an ability in the jury to separate from its mind, and in the consideration of the case, nonevidentiary matters from evidence. Impressions of the Assistant United States Attorney, as well as hypothetical problems having no bearing on the case, were discussed in the presence of the jury. Early in the trial, the Assistant United States Attorney requested a right to approach the bench to discuss such a matter, which request was denied (R. 83). Thereafter, the court did recognize that certain statements in the presence of the jury could be prejudicial to the defendants in warning a witness out of the presence of the jury (R. 120). This recognition ceased when the court later expressed its opinion on the question of the legality of making or maintaining a market in securities. Without the opportunity for legal argument on the matter and in the presence of the jury, this opinion of the court was persisted in, over objection, terminating in the court remarking:

> "I don't think so, counsel, you and I disagree and since I have the last word I will stand on it." (R. 343)

Again the court, in the presence of the jury, in attempting to explain an extremely technical aspect of securities markets, assumed the sale of "worthless" stock, and also assumed " . . . matching the sales to maintain a price . . ." with the conclusion that such would be "an illicit transaction" (R. 345). Such a matter would without doubt involve at least "an illicit transaction"; however, this matter was not before the court and the jury, nor was any allegation of matched sales made or proved, nor was any allegation that the stock of Comstock, Ltd. was "worthless" made or proved. The court admitted that:

> "Now we haven't gotten to that state in this case and we may not get there." (R. 345)

The case did not "get there." There can be no doubt that statements such as these in the presence of the jury, no matter what subsequent instructions might be given, severely prejudiced the rights of the defendants to a fair trial, as well as made it clear to the jury that the court was taking sides in the case.

The Assistant United States Attorney on another occasion requested a right to approach the bench (R. 432). Upon denial of this right, the court was advised that the original of a certain document (Exhibit 52) was in the Superior Court files of the State of California (R. 433). The discussion continued, to the prejudice of the defendants, in which it was disclosed that the witness had apparently sued the defendant company, which

fact, when pointed out to the court, caused the court to state:

> "I didn't say he had sued. You are the one that said that." (R. 434)

Even with the attitude of the court clear as it related to discussions out of the presence of the jury, counsel for the defendants, while reluctant to do so, on two additional occasions, objected to discussions in the presence of the jury (R. 471, 623). Both objections were overruled, and discussions prejudicial to the rights of the defendants continued. In the case of United States v. Powell, 171 F. Supp. 202, (DC. Cal. 1959), the court stated:

> " * * * * Courts, particularly in criminal cases, are zealous in protecting the rights of a defendant against the possibility of the jury being influenced by nonevidentiary matters." United States v. Powell, 171 F. Supp. 202, 205, (D.C. Cal. 1959).

Also, the California District Court of Appeal stated in People of the State of California v. Doyle Terry, 4 Cal. Rptr. 597 (1960):

> " * * * * Ordinarily, the better practice requires that all doubtful questions of evidence or procedure should not be proposed or discussed in presence of the jury (88 C.J.S. Trial § 84), ..." People v. Terry, 4 Cal. Rptr. 597, 600 (Cal. App., 1960)

Also see Eierman v. United States, 46 F.2d 46 (10th Cir., 1930) where the court stated:

> "It is our conclusion that the better practice is to hear evidence bearing upon the admissibility of other evidence, out of the presence of the jury, unless such preliminary evidence likewise goes to the weight of the

evidence proffered, or unless the preliminary evidence is clearly of a nonprejudicial character. Whether failure to adopt this practice is reversible error depends upon whether it appears that the preliminary evidence did not prejudice the rights of the defendant in the particular case. Considering the extent and nature of the preliminary evidence in the case at bar, we cannot say affirmatively that it was not prejudicial. 'And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmative appears that they were harmless.' Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82, 39 S. Ct. 435, 437, 63 L. Ed. 853. The peculiar circumstance that hearsay evidence was offered before the question of admissibility arose and after it had been determined, leaves a suspicion that this unwarranted practice was indulged in because it was prejudicial, a practice that cannot be sanctioned." Eierman v. United States, 46 F.2d 46, 49 (10th Cir., 1930).

The effect of continued and repeated discussions of matters which could not properly be testified to or placed in evidence, it is urged, were prejudicial and had the effect of denying the defendants a fair trial.

POINT ELEVEN

THE TRIAL COURT ERRED IN ELECTING NOT TO GIVE INSTRUCTIONS THAT WERE FAVORABLE TO THE DEFENDANTS, BECAUSE DEFENSE COUNSEL, IN COMPLIANCE WITH RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE, REQUESTED THAT THEY BE INFORMED OF THE INSTRUCTIONS WHICH THE COURT WOULD GIVE OR THE ACTION WHICH THE COURT WOULD TAKE ON THE INSTRUCTIONS TENDERED BY THE PROSECUTION AND THE DEFENSE.

The following colloquy gives rise to Point Eleven:

"THE COURT: Counsel for the defense, the reason I didn't bring the jury back, I want to be sure that we understand each other on Rule 30. I realize that Rule 30 says that the Court shall inform counsel of the instructions it proposes to give. I never insisted on the court doing it because I felt I was fully capable of pointing out the errors in the instructions. If you feel in any way that will work to your prejudice by not indicating the instructions I'm going to give, I'll indicate them to you in a general way.

"MR. ERICKSON: I think that would be very helpful.

"THE COURT: Do you think it will work any prejudice in any way?

"MR. ERICKSON: It would, your Honor.

"THE COURT: Then I will cut some of the instructions I am going to give for you. They were very favorable. Those go out. So I'll tell you now what I'm going to give.

"MR. ERICKSON: Just a moment.

"THE COURT: I'm going to give them to you.

"MR. ERICKSON: We will withdraw our objection.

"THE COURT: No, I'm going to give them now. The issue has been made. Here are the instructions I am going to give. . . ." (R. 904-905.)

Again, authority hardly seems necessary to oppose such action by the trial court. The court's duty is to instruct on the law of the case, and the right provided by Rule 30, Federal Rules of Criminal Procedure, should be observed. United States v. Crescent Kelvan Co., 164 F.2d 582 (3rd Cir. 1948). The obvious purpose of the rule is to enable lawyers to make an argument to the jury that will not usurp the court's function and go beyond the instructions that the court intends to give. Ross v. United States, 180 F.2d 160 (6th Cir. 1950). It is impossible to guess what the instructions were or what instructions the court would have given had not Rule 30, Federal Rules of Criminal Procedure, been looked to for the purpose of making a logical and fair argument.

It is respectfully submitted that the trial court's action shows a state of mind that is abhorrent to our system of jurisprudence and reflects his bent of mind which denied the defendants a fair trial.

POINT TWELVE

THE JURY'S VERDICT IS NOT SUPPORTED BY SUBSTANTIAL OR COMPETENT EVIDENCE WHICH WOULD ESTABLISH THE DEFENDANTS' GUILT BEYOND A REASONABLE DOUBT, AND THE DEFENDANTS WERE ENTITLED TO A JUDGMENT OF ACQUITTAL AS A MATTER OF LAW.

A motion for judgment of acquittal was made at the close of the prosecution's case (R. 786). Thereafter, a motion to strike was made, relating to the exhibits and testimony which have heretofore been the subject of the evidentiary arguments in this brief, which was denied (R. 826-830). The motion for a judgment of acquittal was also renewed after defense counsel had reviewed the evidence and had elected to rest without putting on a defense, other than that which appeared during the presentation of the prosecution's case in chief (R. 850).

When the motions for a judgment of acquittal were made, the court took both motions under advisement and allowed the matter to be submitted to the jury. The motion was renewed after a verdict of guilty was returned (R. 1021-1022).

Thereafter, the court set December 3, 1962, for a determination of the merits of the defendants' motions for judgment of acquittal and for sentencing in the event a judgment of acquittal should be denied (R. 1023). On December 3, 1962, after reviewing the brief filed by the defendants, the court continued the matter to December 17, 1962, for a ruling on the motion for judgment of

acquittal or for sentencing if the motion was denied. Before sentence was imposed on December 17, 1962, the court had before it the brief and reply brief of the defendants and the prosecution's brief wherein the government admitted that it was error to admit Exhibit 22.

The record supporting the indictment is devoid of evidence which would support a conviction, and an acquittal should follow as a matter of law. Rule 29, Federal Rules of Criminal Procedure grants unto the defendants the right to move for the entry of a judgment of acquittal as to the offenses charged in the indictment when the evidence is insufficient in quantity or quality to sustain a conviction of the offense or offenses charged. This Court, in a proper case, may also enter a judgment of acquittal when the quantity or quality of the evidence fails to sustain proof beyond a reasonable doubt. Karn v. United States, 158 F.2d 568 (9th Cir. 1946). Woodard Laboratories v. United States, 198 F.2d 955 (9th Cir. 1952); Venus v. United States, 287 F.2d 304 (9th Cir. 1960) where a conviction was upheld and reversal and dismissal was ordered by the Supreme Court. 368 U.S. 345, 82' S. Ct. 98, 7 L. Ed. 2d 341 (1961). If the evidence is totally lacking and no competent or substantial evidence exists to sustain the verdict, the judgment must necessarily be granted either in the trial court or in the Court of Appeals. Karn v. United States, supra; DeJonge v. Oregon, 299 U.S. 353, 57 S. Ct.

255, 81 L. Ed. 278 (1936). See also, Thompson v. Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed.2d 654, 80 A.L.R.2d 1355 (1960), where a conviction without evidence was held to be a denial of due process.

Where a conviction is based upon circumstantial evidence, the circumstance proven must be such as will directly support an inference of the fact to be established. All reasonable doubt as to the innocence of the accused must be overcome by established facts. Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954); United States v. Baker, 50 F.2d 122 (2nd Cir. 1931); Brady v. United States, 24 F.2d 399 (8th Cir. 1928).

In determining whether or not the record will support a conviction, the Court should consider the pronouncement in Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954), where the Court of Appeals, in reviewing a conviction of all defendants of the crime of jury tampering, said, in directing an acquittal of Michael J. Benallo:

> "Whenever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is favorable to innocence, such circumstance is robbed of all probative value and is insufficient to support a judgment of acquittal." Calvaresi v. United States, 216 F.2d 891, 905.

Calvaresi v. United States, 348 U.S. 961, 75 S. Ct. 522, 99 L. Ed. 749 (1955), where the Supreme Court reversed the conviction of all defendants on counsel's petition for certiorari.

Of the same tenor is Judge Hutcheson's opinion in Kassin v. United States, 87 F.2d 183, 184 (5th Cir. 1936), where he reversed a conviction and stated the rule to be:

> "Circumstantial evidence can indeed forge a chain and draw it so tightly around an accused as almost to compel the inference of guilt as a matter of law. Again, circumstantial evidence may forge the chain and draw it tight by legally justifiable, rather than absolutely compelling, inferences. In each case, however, where the evidence is truly circumstantial, the links in the chain must be clearly proven and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, the inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but inconsistent with every reasonable hypotheses of innocence." Kassin v. United States, 87 F.2d 183, 184 (5th Cir. 1936).

In Union Pacific Coal Co. v. United States, 173 Fed. 737, 740 (8th Cir. 1909), Judge Sanborn, in a landmark decision said:

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypotheses but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment of conviction." Union Pacific Coal Co. v. United States, 173 Fed. 737, 740 (8th Cir. 1909).

Justice Bone, in Karn v. United States, supra, directed that an acquittal enter for lack of evidence in a larceny prosecution, when the evidence before the court on appeal did not point so surely and unerringly to the guilt of the accused as to exclude

every reasonable hypothesis but that of guilt, and said, after analyzing the circumstantial evidence which supported the conviction:

> "In our examination of this record, we have recognized the rule announced in Banks v. United States, 9 Cir., 147 F.2d 628 that if there be some competent and substantial evidence to sustain the verdict, we must affirm. We have carefully examined this record and we find no evidence of this character.
>
> "Viewing the evidence most favorable to the government, we gather from the record the following facts:
>
> "The prosecution relied entirely upon circumstantial evidence for a conviction. It is sufficient to say that under such circumstances the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence. The evidence should be required to point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis but that of guilt. 23 C.J.S. Criminal Law, § 907, pp. 151, 152; Paddock v. United States, 9 Cir., 1935, 79 F.2d 872, 876; Ferris v. United States, 9 Cir., 1930, 40 F.2d 837, 840. Our considered judgment is that the evidence in this case falls far short of meeting this exacting standard." Karn v. United States, 158 F.2d 568, 569 (9th Cir. 1946).

The test was again reiterated in Woodard Laboratories v. United States, 198 F.2d 995 (9th Cir. 1952), after the defendants were convicted of a violation of the Federal Food, Drug and Cosmetic Act and contended on appeal that the evidence was insufficient to support a conviction. In analyzing the evidence and sustaining the conviction, the court said:

> "The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a

jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680. See Banks v. United States, 9 Cir., 1945, 147 F.2d 628. However, the appellant strongly urges that the Government's case is founded upon circumstantial evidence, and that therefore the proper test of whether the evidence is sufficient to sustain the judgment depends upon whether all of the substantial evidence is as consistent with a reasonable hypothesis of innocence as with guilt; if it is, the judgment must be reversed. Karn v. United States, 9 Cir., 1946, 158 F.2d 568; McCoy v. United States, 9 Cir., 1948, 169 F.2d 776. * * * Substantial evidence is '* * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * *.' N. L. R. B. v. Columbian Co., 1939, 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660. The testimony of witnesses Carol and Banes was substantial and cannot be said to have been as consistent with a reasonable hypothesis of innocence as with guilt." Woodard Laboratories v. United States, 198 F.2d 995, 998.

Of like effect was the decision in United States v. Riggs, 280 F.2d 949 (5th Cir. 1960), where the court said, in analyzing a thirteen-count indictment charging conspiracy and a violation of the Revenue Laws:

> "On a motion for judgment of acquittal the test is whether, taking the view most favorable to the Government, a reasonably minded jury might accept the relevant evidence as adequate to support a conclusion of the defendant's guilt beyond a reasonable doubt." United States v. Riggs, 280 F.2d 949 (5th Cir. 1960).

A conviction that is not supported by substantial evidence is the same as a conviction on a charge not made and should not be allowed to stand. Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L. Ed. 2d 659 (1960); DeJonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 279 (1936).

In reviewing the record, this Court must determine whether or not the United States had established by substantial and competent evidence that the defendants were guilty beyond a reasonable doubt as to every count in the indictment. Necessarily, the evidence must be reviewed to determine what evidence is competent and what evidence is substantial enough to point to the defendants' guilt beyond a reasonable doubt. The government's case hinges on Exhibit 22, which was a letter from Fleischell, an attorney practicing in San Francisco, to Marvin Greene,who at that time was an employee of the Securities and Exchange Commission (R. 465, 739-888). This letter set forth the numbers of certain stock certificates, the number of shares represented thereby, as well as the name of the record owner thereof, which certificates were purportedly delivered to the Security Transfer Corporation at the instance and request of a person or persons unknown. Circumstantially, it may be inferred from the record that David Alison created the escrow account at the Security Transfer Corporation. Neither of the defendants were named in the exhibit, and Exhibit 22 served as a keystone for the admission of other exhibits. Thus, without foundation the exhibit must necessarily fall. The case of the United States must fail if the evidence complained of was essential to establish guilt. See Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958);

Standard Oil of California v. Moore, 251 F.2d 188 (9th Cir. 1957); N.R.L.B. v. Sharpless, 209 F.2d 645 (6th Cir. 1954). Accord, Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L. Ed. 645 (1943).

To establish a prima facie case, the Government must by competent evidence establish that there was a scheme or artifice to defraud that was used to obtain money or property by the use of untrue statements of material facts or by the omission to state material facts which were necessary to make the statements made not misleading. The evidence of scheme relied upon by the United States Attorney to establish his case springs from H. Carroll & Co.'s actual purchase of approximately 300,000 shares of the common stock of Comstock, Ltd. from the Securities Transfer Corporation at twenty-five cents per share, during a period when shares were also purchased through the facilities of the San Francisco Mining Exchange (R. 715). Even if an escrow was established and the sale of securities did occur, a scheme to defraud was not established.

Howard P. Carroll himself made no misstatements of fact, and the scheme, as well as the false representations which would be chargeable against Carroll, must lie in things done and words uttered by others at the instance and request of Carroll. United States v. Kemble, 198 F.2d 889 (3rd Cir. 1952); United States v. Food and Grocery Bureau of Southern California, 43 F. Supp. 966

(S.D. Cal. 1942). No salesman suggested that Carroll had authorized any representation of a material fact which would be false in nature, and Carroll's good faith in training salesmen would not be such as to cause him to answer for their criminal acts. Any evidence which supports the Government's charge consists of leading questions with their parrot-like answers. It is difficult to truly evaluate the evidence, but the fact remains that the conviction of Howard P. Carroll on the Six Counts charged in the Indictment must rest upon inference, with inference piled upon inference, to reach the prosecution's desired end.

In measuring the criminal responsibility of a corporate president for the acts of its salesmen, the court must consider the tests which have been laid down to establish guilt in a criminal case. United States v. Kemble, 198 F.2d 889 (3rd Cir. 1952), involved prosecution of a labor union and its business agent for committing acts of violence and various other acts which constituted extortion and obstruction of commerce. There the court held that the evidence was insufficient to show that the defendant local union actively participated in or authorized or ratified acts of the business agent, and, therefore, conviction of the union was unjustified. The decision principally rested upon the court's acceptance of the idea that a principal or master cannot be held criminally for acts of his agent contrary to his orders, and without authority, express or implied,

merely because such acts are within the course of its business and within the scope of the agent's employment. Civil liability, in the opinion of the court, could have rested upon the same circumstances, but the court held that the principles of civil liability cannot be extended to a criminal prosecution. The doctrine of respondeat superior is a tort doctrine and finds no application in the criminal law. The statements of salesmen to the investor witnesses will not support a conviction unless the statements were made with the knowledge or at the direction of Howard P. Carroll, and no evidence appears in the record to sustain such a conclusion.

Sufficient evidence did not appear to show a concert of action between Howard P. Carroll and the corporation to bring about a conviction of any of the counts charged in the Indictment. In the leading case of Fuentes v. United States, 283 F. 2d 537 (9th Cir. 1960), this Court speaking through Justice Jertberg, defined the concept of concert of action and the limitationswhich must be placed upon testimony of witnesses who testify as to acts of agents committed out of the presence of the principal. In the principal case, Fuentes and a co-defendant, Torres, were tried jointly and were convicted on an indictment which charged violation of the narcotics law. On appeal the question was raised as to the propriety of the admission of

statements and alleged admissions which were made by the co-defendant, Torres, out of the presence of Fuentes, on the basis of the hearsay rule. In analyzing the defendant's contention in the light of the applicable law, the court held that the evidence, by way of extra-judicial statement and admission, even though outside of the presence of the defendants, was admissible, since there was sufficient independent evidence of concert of action between the defendants, and said:

> "In the instant case the statements and admissions of Torres were not received against the appellant until there was first received ample evidence, apart from the admissions and statements of Torres, from which the jury might reasonably infer the existence of a conspiracy or concert of action on the part of appellant and Torres, to violate the Federal Narcotics Law. This independent evidence in part consisted of (1) the fact that appellant was physically present at the scene of each transaction alleged in counts 1 to 5 inclusive; (2) there was contact between Torres and the appellant in each transaction between the receipt of the purchase price by Torres from the Treasury Agent and the time Torres made actual delivery of the heroin to the Treasury Agent; (3) in each transaction there was testimony by the Treasury Agent that something was seen to pass between Torres and the appellant; and (4) there were oral admissions made by the appellant to the Treasury Agent that he acquired the heroin from sources in Mexico and San Diego." Fuentes v. United States, 283 F.2d 537, 540 (9th Cir. 1960).

In addition to stating the doctrine of agency and clarifying the meaning of "concert of action," this Court introduced the concept of "combination." In so doing, it quotes from the case of Hitchman Coal and Coke Company v. Mitchell, 245 U.S. 229, 38 S. Ct. 65, 62 L. Ed. 260 (1917), as follows:

"'In order that the declaration and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves.'" Hitchman Coal and Coke Company v. Mitchell, 245 U.S. 229, 239, 38 S. Ct. 65, 72, 62 L. Ed. 260, 268 (1917). See also, Morei v. United States, 127 F.2d 827 (6th Cir. 1942).

A review of the record discloses that Howard P. Carroll was not present at the time any of the alleged misrepresentations were made, and the testimony of the investor witnesses was such that it becomes clear that there was no uniformity in the statements made to them by the various salesmen working for H. Carroll & Co. Howard P. Carroll was not tied into any representation made by any salesmen.

In reviewing the evidence, it becomes clear that Howard P. Carroll did not act in concert with H. Carroll & Co., or with any of its agents, to perpetrate any scheme to defraud upon any investor. The case most in point is Getchell v. United States, 282 F.2d 681 (5th Cir. 1960), where the defendants were charged with both mail fraud violations and fraud in the sale of securities. A conviction was returned against all defendants, even though the evidence was fragmentary against some of the defendants, and on appeal the conviction was reversed. In reviewing the evidence, we must determine whether it is sufficient to

establish evidence of a manipulation or rigging case. Such a charge is not supported by the testimony or by the exhibits produced.

In determining whether or not market rigging or manipulation occurred, it is necessary to view the records of the San Francisco Mining Exchange, which show that the price of Comstock, Ltd. stock fluctuated from twenty-five cents per share to a high of thirty-six cents per share, and then held the price of twenty-five cents per share for some two months after the period expired that is complained of in the Indictment (Exhibits 32, 33, 34 and 79) (Quotation sheets of the San Francisco Mining Exchange for the months in issue).

The Indictment alleges that Howard P. Carroll and H. Carroll & Co. devised a scheme whereby sales of the stock of Comstock, Ltd. were induced by the use of untrue, deceptive, and misleading statements of material facts. The false statements charged both to H. Carroll & Co. and to Howard P. Carroll as an individual were set out with particularity in Paragraph 2 of the Indictment and consisted of the following:

> "2. The defendants Howard P. Carroll and H. Carroll & Co., in order to deceive and mislead investors, and to induce them to purchase shares of the stock of Comstock, Ltd., made and caused to be made untrue, deceptive and misleading statements of material facts, including the following:
>
> "(a) That the stock of Comstock, Ltd. was being offered and sold at the market price.

"(b) That Comstock, Ltd. operated a quicksilver mine in Cloverdale.

"(c) That Comstock, Ltd.'s course was being chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record.

"(d) That Country Club Charcoal Corporation was on the verge of fantastic profits; and other similar untrue, deceptive and misleading statements of material facts, all of which the defendants well knew to be false, fraudulent and misleading."

It is clear from an analysis of the record, in the light of the misrepresentations charged, that only one witness suggested that the representation had been made that Comstock, Ltd. was being offered and sold at the market price. All investor witnesses testified that they bought the stock as principals, and many admitted that they bought it as a speculation. No fact was misrepresented if the statement was made that the stock was being offered and sold at the market price, inasmuch as the price was obtained from the San Francisco Mining Exchange.

All alleged false statements which may have been made to investors, including those named in Counts 1 to 3, which go beyond the specific alleged false statements in Paragraph 2, subparagraphs (a), (b), (c), and (d) of Count 1, may be shown only for the purpose of establishing a scheme. The specific false statements (b) "That Comstock, Ltd. operated a quicksilver mine in Cloverdale," and (c) "that Comstock, Ltd.'s course was being

chartered by shrewd, able Colonel T. R. Gillenwaters, an industrial counsel and attorney, who had a string of organizational triumphs to his record," were admitted to have been true by the Government as a result of the failure of proof relating to the operation or nonoperation of the mine and the testimony of Colonel Gillenwaters which establishes the accuracy of the statement relating to him. The alleged false statement, subparagraph (d) of Paragraph 2 of Count 1, "that Country Club Charcoal Corporation was on the verge of fantastic profits," which was taken out of context, must be considered in the light of the complete statement appearing on page 8 of the Charcoal Brochure, Exhibits 57 and 85. The complete statement is as follows:

> "Even though Country Club Charcoal was on the verge of fantastic profits, it took more money than Alison had to enter the charmed circle."

Again, no testimony was presented that Country Club Charcoal was not, prior to the sale of the assets to Comstock, Ltd., on the verge of fantastic profits, if, according to the statement, additional moneys had been available to Alison. Therefore, even considering all evidence in the light most favorable to the Government, three out of the four alleged misrepresentations must immediately fall as not having been proved in any respect.

Subparagraph (a) of Paragraph 2 of Count 1 alleges misrepresentations in the statement "that the stock of Comstock, Ltd. was being offered and sold at the market price." Only one witness,

Count 3, investor Wyatt, stated that he was told that he was purchasing the stock at the market. The only evidence presented was that all such shares were in fact being sold at the "market." The inference of manipulation, due to the fact that H. Carroll & Co. was purchasing shares of stock of Comstock, Ltd. from a San Francisco Mining Exchange member house and at the same time was purchasing identical shares from a deposit account with the Securities Transfer Corporation in Denver, was present, but was not alleged. Thus, on the face of the Indictment and from a review of the evidence, the question presented, but not affirmatively alleged, is not were the sales at the market, but was that market a free and open market or a manipulated market? That there was a free and independent market, not controlled or dominated by H. Carroll & Co., is apparent from Government's Exhibits 32, 33, 34, 79 (the quotation sheets of the San Francisco Mining Exchange) and 104 (the records of Chevrier & Co.). These exhibits clearly established that during the time that shares were sold, including the time such shares were sold to investor Wyatt, H. Carroll & Co. was effecting very few transactions through purchases from the exchange member. For the fifteen-day period April 23 - May 6, 1957, a total of 6,500 shares of common stock of Comstock, Ltd. were sold through the facilities of the Exchange. Of this amount, only 1,000 shares were purchased by H.

Carroll & Co., and these at a price of twenty-six cents per share. Also, for the period commencing May 14, 1957 to July 22, 1957, a period of approximately seventy (70) days, H. Carroll & Co. purchased a total of 3,000 shares, through the facilities of the Exchange, out of a total of 20,000 shares purchased on the Exchange. This, as a matter of law, would establish that H. Carroll & Co. was not dominating and controlling the market on the Exchange, and that shares which he purchased from the exchange member were at a price established through transactions by other purchasers. The testimony before the trial court was that the market price, as established for the resale of shares of stock purchased by H. Carroll & Co., was that which was given to H. Carroll & Co. traders from the member firm. Those principal sales were made to customers at the "market." H. Carroll & Co. had no obligation to disclose cost of purchases by it of such shares at a lower price, unless such shares were sold to customers as their agent. In any event, the price differential between the cost of shares purchased from the deposit account and the price at which such shares were sold to customers from twenty-five cents to thirty-six cents per share was approximately the normal and customary commission involved on such low price stocks with small volume of trading. As a matter of law, there was no evidence that the stock sold was not sold at "the market

price." Only a scintilla of evidence exists that the market may not in fact have been realistic. This evidence is overwhelmingly rebutted by a review of the actual transactions on the Exchange itself. Also to be borne in mind is the fact that in addition to the 500,000 shares on deposit with the Security Transfer Corporation and the 1,500,000 shares issued, or to be issued, for the acquisition of the assets of Country Club Charcoal Corporation, an additional 500,000 shares of stock were outstanding and could be traded without restriction. The total volume of purchases over the Exchange, in relation to the total number of tradable shares outstanding, is such as to make a manipulation impossible.

As the Court knows, the classic manipulation requires control over all, or substantially all, of the outstanding shares, so that purchases will in fact cause the market to rise. A review of Exhibit 104 (records of Chevrier & Co.), as well as Exhibits 32, 33, 34, and 79 (records of the San Francisco Mining Exchange), adequately establishes that as often as not purchases on the Exchange caused the market price to decrease as to increase.

The fraud provisions of the Securities Act only require additional statements to be made in the event certain statements which have been made will be misleading in the light of the circumstances under which they are made, unless the additional

statements are made. Even if this were not the case, the alleged failure to state material facts, as set forth in Count 1, Paragraph 3, subparagraphs (a) through (f), were not established by the evidence. As with the alleged positive misstatements, subparagraphs (d) "that the Cloverdale quicksilver mine had been shut down in November or December of 1956," and (e) "that Comstock, Ltd.'s course was not chartered by Colonel Gillenwaters," of Paragraph 3, Count 1, must fall in view of the lack of testimony relating to the mine and Colonel Gillenwaters' testimony as to his management functions.

Subparagraph (a) of Paragraph 3 of Count 1 relates again to the market price and the alleged domination by H. Carroll & Co. The simple fact that shares of Comstock, Ltd. were purchased by H. Carroll & Co. through the facilities of an exchange member certainly does not establish domination. As set forth above, the records presented conclusively show the reverse.

There is no obligation on the part of the company to disclose the source of its stock purchased when selling as principal. This is a fundamental concept in the securities business. The fact that such shares were purchased at a particular low price, with no evidence relating to the time of purchase, would not require a disclosure that such shares had been purchased at any price. No testimony was presented that H. Carroll & Co. had

a right to purchase shares in addition to the shares which it did in fact purchase from the deposit account. The only evidence available is that H. Carroll & Co. did in fact purchase some shares from this account and that these shares were held and thereafter sold as principal to customers at a price substantially equivalent to the price at which the shares were purchased by others, as well as H. Carroll & Co., on the Exchange.

To consider the further alleged omissions set forth in subparagraphs (c) and (f) of Paragraph 3 of Count 1, reference must again be made to the charcoal brochure, Exhibits 57 and 85. It is true, as established by the evidence, that the Country Club Charcoal Corporation had not made a net profit from its operation prior to its "merger" with Comstock, Ltd. Testimony did establish that Country Club had income from operations. The brochure also clearly shows that the Country Club operation was not profitable, for if it had been profitable, there would have been no need for "more money than Alison had to enter the charmed circle." The brochure does not, even by reference or implication, attempt to convince the reader thereof that Country Club had operated in the past at a profit.

As far as projections are concerned, projections of future happenings are not in themselves crimes when clearly labeled as such. The brochure clearly sets forth that "the principals of

Comstock, Ltd. are frank in their inability to estimate the profits." Also, "the foregoing figures are estimates from best information available, but must be understood as projection of estimates." The caption itself to the tabulation is labeled "Projected Production for 1957-58." As far as substantial basis in fact for such projections, the only evidence available on this matter is the statement by Alison that he, the expert in the charcoal field, which was undisputed, felt and still feels that such projections were realistic from the operation of the indicated kilns.

As a matter of law, the tie-in of the preparation of the brown brochure is such that it cannot be attributed to either of the defendants in this case. The brochure was prepared by Raetz under the supervision and control of expert Gillenwaters, with additional information being furnished by charcoal expert Alison. Prior to printing, the brochure was also reviewed by attorney Frank, who was representing Comstock, Ltd., as well as H. Carroll & Co. The good faith in the preparation of this document by such experts is apparent. This is apparent even if there was sufficient evidence to establish that H. Carroll & Co. was responsible for the document's preparation. The Court will certainly take judicial notice that stockholders' reports of every sort and nature are delivered to and in possession of

brokers and dealers in securities throughout the country. Every broker or dealer who has such report in its files or available for examination by prospective stock purchasers, certainly cannot be held criminally responsible in the event any such document contains false statements, for to do so would eliminate all brokers and dealers from the business.

Thus, from an analysis of the record it becomes clear that an acquittal should follow as a matter of law. From a review of the record it becomes apparent that there were many circumstances and facts which were as consistent with innocence as they were with guilt. If a single fact gives rise to such conflicting inferences, this Court has ample authority for setting aside the judgment of conviction. Karn v. United States, 158 F.2d 568, 570 (9th Cir. 1946); Kassin v. United States, 87 F.2d 183, 184 (5th Cir. 1936); Union Pacific Coal Co. v. United States, 173 Fed. 737, 740 (8th Cir. 1909); Nosowitz v. United States, 282 Fed. 575 (2nd Cir. 1922); Gracette v. United States, 46 F.2d 852, 853 (3rd Cir. 1931); Leslie v. United States, 43 F.2d 288 (10th Cir. 1930).

POINT THIRTEEN

THE CUMULATIVE EFFECT OF EACH AND ALL OF THE ERRORS COMPLAINED OF WAS TO DENY THE DEFENDANTS A FAIR AND IMPARTIAL TRIAL.

The case before the court and the jury was, at best, a close case. Under such circumstances, and as a result of the continued and repeated questioning of the prosecution's witnesses by the court, as well as the comments of the court, the majority of which were in the presence of the jury, causes the fairness and the general demeanor of the trial to be questioned. The court, in United States v. Carmel, 267 F.2d 345 (7th Cir. 1959), considered a similar problem and the relationship of the cumulative effect of the actions of the court on the fairness of the trial, and said:

> ". . . We are convinced that all of the evidence in the record presented a close case to the jury for decision. Therefore Carmel's contention that prejudicial error in the course of the trial substantially affected the fairness thereof requires our consideration. Our attention is called to repeated questioning of witnesses and comments by the court, some of which we now cite. . . .
>
> "We recently said, in United States v. Scott, 7 Cir., 257 F.2d 374, 377:
>
> "'The influence of the trial judge on the jury is necessarily and properly of great weight, Starr v. United States, 1894, 153 U. S. 614, 626, 14 S. Ct. 919, 38 L.Ed. 841, and he should not say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts. United States v. Levi, 7 Cir., 1949, 177 F.2d 833. It is the

duty of the trial judge to endeavor to maintain throughout the trial an atmosphere of impartiality. United States v. Wheeler, 7 Cir., 1955, 219 F.2d 773. . . .'

". . . We realize that an alert and capable judge at times feels that he can assist in developing the evidence by participating in the interrogation of witnesses. However, he would ordinarily do well to forego such intrusion upon the functions of counsel, thus maintaining the court's position of impartiality, in the eyes of the ever-observant jurors. The record in this case reveals no justification for the extensive intervention of the able trial judge."

Chief Judge Duffy (concurring):

"Judge Schnackenberg has quoted extensively from the examination of witnesses which was conducted by the trial court. Separately considered, many of such quotations would not, in my mind, be a basis for a holding of prejudicial error. However, taken all together, I have been forced to the conclusion that in this close case the attitude of the learned trial judge must have had great influence with the jury, and the 'atmosphere of impartiality' was thus destroyed." United States v. Carmel, 267 F.2d 345, 347 (7th Cir. 1959).

The Statement of Points reflects what counsel for the defense believe to be points of error. Each of the errors complained of could not be argued because of space limitations, and only the 13 most important points have been considered. However, the 78 points urged reflect the atmosphere and basis upon which the defendants suffered what we believe to be an erroneous conviction. A thousand immaterial and irrelevant pieces of evidence appeared in the record for the purpose of creating inference based upon inference and suspicion upon suspicion, if not for the purpose of confusing the jury, so that sympathy for the investor witnesses would bring about a conviction. In Oaks v.

People, 371 P.2d 443 (Colo. 1962), the court said:

> ". . . [N]umerous formal irregularities, each of which in itself might be deemed harmless, may in the aggregate show the absence of a fair trial, in which event a reversal would be required. Penney v. People, 146 Colo. 95, 360 P.(2d) 671. Moreover, technical errors may have a significance requiring a reversal in a close case. People v. Van Cleave, 208 Cal. 295, 280 Pac. 983." Oaks v. People, 371 P.2d 443 (Colo. 1962).

Thus, it is apparent that the defendants were prejudiced by the numerous errors complained of in this brief, and a reversal should follow to the end that a fair trial can be held if this Court does not direct that a judgment of acquittal should enter after reviewing the record.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed and remanded with directions for the trial court to grant the motion for a judgment of acquittal as to both Howard P. Carroll and H. Carroll & Co. or, in the alternative, that the case should be remanded with directions for a new trial before a different judge.

Respectfully submitted,

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APPENDIX

PROSECUTION'S EXHIBITS	IDENTIFIED	OFFERED AND RECEIVED
1		391
2		113 - 135
4		524
6		525
7		528
8		782
15		373 - 782
16		521
18		711
22		465
27	377	382
28		658
29		658
30		658
31		658
32		647 - 658
33		647 - 658
34		647 - 658
36		457
37		457
38		457
39		457
40		457
41		457
43		458
44		277
45		458
46		458
47		280
48		280
52		433
53		434
54		583
55		589
56		589
57		593
58		595
59		593
60		594
61		595
62		596
63		596
64		597

PROSECUTION'S EXHIBITS	IDENTIFIED	OFFERED AND RECEIVED
66		602
67		602
68		420
69		420
70		660
71		660
72		661
73		661
74		662
75		663
76		616
77		616
78		398
		(Withdrawn on page 400)
79		647
81		667
84		458
85	439	441
86	453	457
87	453	457
93	557	784
94	584	585
95	601	602
96	601	602
97		647
103	718	718
104	718	729
105	740	768
106	754	768

DEFENDANTS' EXHIBITS	IDENTIFIED	OFFERED AND RECEIVED
A	139	141
B	139	141
C	144	163
D	282	285
E	282	285
F	282	295
G	282	295
H	506	517
I	506	517
J	700	
K	719	725
L through T	850	

No. 18551

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 18551

IN THE

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APPELLEE'S BRIEF.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

On May 23, 1962, the Federal Grand Jury for the Southern District of California, Central Division, returned a six count indictment against the appellants Howard P. Carroll and H. Carroll & Co. Each count alleged a violation of Title 15, United States Code, Section 77q(a). [C. T. 2-12.][1] On June 25, 1962, appellants entered a plea of not guilty to all six counts. [C. T. 15.] Trial commenced on November 1, 1962 [C. T. 132] and on November 9, 1962, the jury found appellants guilty on all counts. [C. T. 257-259.] On December 17, 1962, appellant Howard P. Carroll received a suspended sentence, was placed on probation for one year, and was fined $2,500. Appellant H. Car-

[1] "C. T." refers to Clerk's Transcript of Record.

roll & Co. was fined $300. [C. T. 345-347.] Timely Notices of Appeal were filed by appellants on December 26, 1962. [C. T. 351-354.]

The jurisdiction of the United States District Court for the Southern District of California, Central Division, was based on Title 15, United States Code, Section 77q(a) and Title 18, United States Code, Section 3231.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

II.

STATUTES INVOLVED.

Title 15, United States Code, Section 77q(a) reads as follows:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> "(1) to employ any device, scheme, or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Title 18, United States Code, Section 3282, reads as follows:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. . . ."

Title 28, United States Code, Section 1732, reads in pertinent part as follows:

> "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section includes business, profession, occupation, and calling of every kind."

III.

STATEMENT OF THE CASE.

A. Question Presented.

It is to be noted that appellants originally presented 78 issues upon which they intended to rely [C. T. 355-363], but their brief, which was served on the Government on June 27, 1963, presents only 13 issues for consideration, assertedly because of space limitations. (Appellants' Br. pp. 425-28.)

In order to avoid needless repetition the appellee will analyze the propositions presented by the appellants' brief in the following order:

A. The appellants' pre-trial motion to strike surplusage in the indictment was properly denied by the trial court.

B. The prosecution of Counts 1, 5 and 6 of the indictment was not barred by the Statute of Limitations.

C. The testimony of Ralph Frank concerning a telephone call to H. Ward Dawson was properly received in evidence.

D. There was no error committed in the procedures employed by the trial court.

E. There is sufficient evidence to sustain the conviction of the appellants on all counts.

F. The trial court did not commit error in the admission of documentary evidence.

G. The trial court did not commit error in its instructions to the jury.

B. Statement of Facts.

This case in substance involves the activities of Howard P. Carroll and H. Carroll & Co. in sales to the public of Comstock Ltd. stock at manipulated market prices.

Comstock, Ltd. was a stock listed on the San Francisco Mining Exchange. This company as it existed during the times mentioned in the indictment was the product of a merger between Country Club Charcoal of Nevada, successor to the defunct Country Club Charcoal of California, and Comstock Ltd.

At the time of this merger, a syndicate headed by David Alison, an entrepreneur, acquired from Archie Chevrier, a promoter of the merger and a member of the San Francisco Mining Exchange, an option to purchase 500,000 shares of Comstock Ltd. stock at 25 cents a share in exchange for a $125,000 note. The optioned stock was placed in escrow at Securities Transfer Corporation, Denver, Colorado.

Thereafter, H. Carroll & Co., through its Denver and Beverly Hills offices, sold 313,000 shares of the escrowed stock (25-cent stock) to the public at manipulated market prices ranging from 30 cents to 35 cents a share. A fraudulent brochure was used as part of the scheme.

The facts in detail as revealed at trial are as follows:

During the latter part of 1956 David Alison and his wife had an interest in a ranch located in Ventura County called Rancho Cola. This ranch was in the process of going through a Chapter XI Bankruptcy

proceeding and was controlled by an organization formed by the Bankruptcy Court which was known as "V-R Ranch". [R. T. 77, 117, 128.][2]

David Alison decided to produce charcoal from the oak trees on the ranch in Ventura County. This decision led to the formation of Country Club Charcoal of California. Country Club Charcoal of California went defunct and Country Club Charcoal of Nevada was organized under the direction of T. R. Gillenwaters in late 1956. [R. T. 77-80, 148.]

In either late 1956 or early 1957 Country Club Charcoal of Nevada merged with Comstock Ltd. Archie Chevrier, a member of the San Francisco Mining Exchange aided in the merger. [R. T. 82-84.] In order to control Comstock Ltd., and in order to get operating capital, David Alison was given an option to purchase 500,000 shares of Comstock Ltd., at 25 cents per share. Alison and his associates gave Archie Chevrier a note for $125,000 and in return Alison received 500,000 shares of Comstock Ltd. [Ex. 1; R. T. 85, 87-89, 155.]

T. R. Gillenwaters recommended that Alison contact a Denver broker named Howard P. Carroll. [R. T. 511.]

Howard P. Carroll in 1957 was President and owned the controlling interest in H. Carroll & Co., a brokerage house with its main office in Denver, Colorado.

Robert Leopold was Vice President and owned 15% of the company. Leopold was primarily a salesman. [R. T. 249-250, 254, 283.] Gerald M. Greenberg owned

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[2]"R. T." refers to Reporter's Transcript.

9% of H. Carroll & Co., and was Treasurer. Greenberg was primarily a trader. [R. T. 255, 313, 336.] Clarence Scholz was employed as office manager. [R. T. 254-255, 362.] John Tice was employed as a trader. [R. T. 255, 346-347.] Liboslav Uhlir was employed as an accountant. [R. T. 467.]

During early 1957, a branch office of H. Carroll & Co. was opened in Beverly Hills, California. Martin McIntyre and Robert Alaska were in charge of the Beverly Hills Office.[3] [R. T. 239-240, 251, 255, 316.]

Ralph Frank, during early 1957, was the attorney representing H. Carroll & Co., in California. Frank was the resident agent for H. Carroll & Co., and also represented H. Carroll & Co., before the California Corporation Commission. [R. T. 258, 370, 672-673, 680.]

Los Angeles area investor orders of stock were handled in the following manner: An investor would order stock from a salesman; the order would be teletyped to Denver from the Beverly Hills Office; tickets would be made up in Denver from the teletype information; confirmations would be mailed to the investor from the Denver Office; the investor would mail his payment to the Denver Office; and the stock certificate would be mailed by the Denver Office to the investor. The paper work was handled in Denver because the Beverly Hills Office was primarily a sales office. [R. T. 246, 251-253, 315-316.]

---

[3]The following salesmen worked in the Beverly Hills Office: Robert Alaska [Ex. 36]; Martin McIntyre [Ex. 37] Frank Hicks [Ex. 38]; John Llewellyn [Ex. 39] Irving Marems [Ex. 40]; Elmo Moen [Ex. 41]; Milton Miller [Ex. 86]; Harold Anderson [Ex. 87]; and Jane Suttle [Ex. 103];

Howard P. Carroll, during 1957, was in direct control of H. Carroll & Co., and made all of the policy decisions. Carroll approved all bills by initialling them and also closely supervised the trading activities. He approved the tickets and if he happened to be away the tickets were left on his desk until his return. [R. T. 251, 260, 317-318, 349, 364-365, 369, 376.]

In late 1956 or early 1957 David Alison, T. R. Gillenwaters and Howard P. Carroll met in the Mayflower Hotel in Denver, Colorado. David Alison brought Howard P. Carroll up to date on the charcoal organization. A discussion took place concerning Comstock Ltd. Howard P. Carroll indicated that he wanted Robert Leopold on the Board of Directors of Comstock Ltd. [R. T. 90-94, 144-145, 157.]

A subsequent meeting concerning Comstock Ltd. was held in Reno, Nevada. Howard P. Carroll sent Robert Leopold to this meeting. David Alison was present. [R. T. 259, 295.] During this period of time Robert Leopold became an officer of Comstock Ltd. [R. T. 92, 259, 290, 356.]

The 500,000 shares of stock in Comstock Ltd. which Alison received from Archie Chevrier, in exchange for the $125,000 note, were deposited in an escrow at Securities Transfer Corporation in Denver, Colorado. Howard P. Carroll was given the option to withdraw the stock at 25 cents per share. [R. T. 367-368, 460-461, 468-469, 686-687.]

Robert Leopold, Gerald Greenberg and John Tice knew nothing about this escrow. [R. T. 256, 300-301, 327-328, 342-343, 355.]

At the Beverly Hilton Hotel, in Los Angeles, in early 1957, H. Carroll and Co. held a sales meeting

concerning Comstock Ltd. The Beverly Hills salesman attended this meeting. David Alison, T. R. Gillenwaters and Howard P. Carroll spoke concerning the charcoal industry and in particular the importance of raising funds. [R. T. 94, 96, 485-486, 608.]

During early 1957 Howard P. Carroll withdrew 313,000 shares of Comstock Ltd. stock at 25 cents per share from the Securities Transfer Corporation in Denver, Colorado. Approximately 286,800 shares of Comstock Ltd. were sold to California investors. [Ex. 27; R. T. 239, 367-368, 396-398, 460-461, 468-469, 712-716, 720.]

The money which Howard P. Carroll paid for the Comstock Ltd. stock escrowed at Securities Transfer Corporation in Denver, Colorado, was forwarded to H. Ward Dawson who in turn forwarded the money to David Alison. Approximately $10,000 to $12,000 was handled in this fashion. Dawson withdrew from the venture and Alison telephoned Howard P. Carroll in Denver and requested more money. Subsequently, Howard P. Carroll sent Alison $50,000 or $60,000. [R. T. 97-99, 101-104, 167, 395, 404.]

During the same period of time that Howard P. Carroll was withdrawing Comstock Ltd. stock from the escrow at Securities Transfer Corporation in Denver, Colorado, at 25 cents a share he purchased Comstock Ltd. stock on the San Francisco Mining Exchange. Howard P. Carroll during the period alleged in the indictment purchased approximately 87,000 shares of Comstock Ltd. stock through Archie Chevrier over the San Francisco Mining Exchange at prices varying from 27 cents to 36 cents a share. [Exs. 104, 106; R. T. 368-369, 375, 460-461, 468, 715-716, 728-729,

733, 736.] During the period alleged in the indictment approximately 131,000 shares of Comstock Ltd. stock were sold over the San Francisco Mining Exchange to the investing public. [Exs. 32, 33, 34, 79, 106.]

Robert Alaska, one of the managers of the Beverly Hills Office of H. Carroll & Co. told Irving Marems, a salesman, that H. Carroll & Co. did the underwriting in Comstock Ltd. and that the subscription had not been completed and H. Carroll & Co. was trying to finish out the underwriting. [R. T. 573.] Clarence Scholz, office manager of the Denver office of H. Carroll & Co., told Liboslav Uhlir, the accountant, that Comstock Ltd. stock was purchased on the San Francisco Mining Exchange to maintain the market. [R. T. 472.]

Howard P. Carroll told Clarence Scholz that ". . . we were going to have executed a trade on the exchange so the price would be printed in the newspaper, . . ." [R. T. 375, 380.]

A teletype message was sent by Robert Leopold at the direction of Howard P. Carroll, from the Denver office of H. Carroll & Co. to the Beverly Hills office. That teletype reads in pertinent part as follows:

> "OK KID BEEN WORKING LIKE A DEMON COMSTOCK WILL BE 33-40 IN FEW MINUTES AS SOON AS EXCHANGE OPENS WE HAVE IT WORKED OUT NOW AND IF YOUR BOYS GOING TO SELL ANY THEY SHOULD DO IT QUICK LIKE WE ARE GOING TO DO EVERYTHING IN OUR POWER TO MAINTAIN MARKET AT THIS LEVEL . . ." [Ex. 44, R. T. 275.]

In the early part of 1957, Howard P. Carroll employed Ken Raetz as a publicity man. Around March 11, 1957, Raetz prepared and submitted an outline of a promotional program for Howard P. Carroll. [Ex. 5.]

On March 26, 1957, Raetz sent a telegram to Howard P. Carroll requesting funds for advertising. Shortly afterwards Raetz received $2,500. from Howard P. Carroll. [Exs. 15, 16; R. T. 372-373, 520, 522, 553.]

In early April of 1957, Raetz prepared a press release concerning the charcoal industry for Howard P. Carroll which was released to Los Angeles area news media. [Ex. 6; R. T. 525.]

Raetz prepared the charcoal brochure for use as selling literature. The charcoal brochure was discussed by Raetz with T. R. Gillenwaters, David Alison and Ralph Frank. Raetz paid for the charcoal brochure with funds which had been provided by Howard P. Carroll. Three or four copies of the charcoal brochure were sent to David Alison and the remainder of the 2500 brochures were sent to Howard P. Carroll in Denver. [Exs. 57, 84, 85, 93; R. T. 113-116, 135, 244, 268-270, 322, 365-366, 487, 491, 505, 511, 518-519, 531-532, 534-535, 540, 556-557.]

The charcoal brochure was examined by Ralph Frank for H. Carroll & Co. and then was presented to the California Corporation Commission for consideration as selling literature. The California Corporation Commission disapproved the brochure. [R. T. 675, 677, 680-681.]

Notwithstanding the disapproval, salesmen from the Beverly Hills office of H. Carroll & Co. used the char-

coal brochure in selling shares of Comstock Ltd. to the investing public. [R. T. 418, 425, 563, 575, 586, 592, 608-610, 675.]

Contrary to representations in the charcoal brochure [Exs. 57, 84, 85], David Alison stated that: He was *not* a prosperous Ventura rancher [R. T. 117]; he did *not* permit itinerant charcoal burners to use his ranch to burn charcoal [R. T. 118]; Comstock Ltd. was *not* the largest producer of charcoal in the west [R. T. 118, 133-134]; kilns did *not* hold 12 cords and after ten days of burning produce 8 tons of charcoal [R. T. 122]; lease acquisitions, machinery and labor did *not* chew away the greater part of $165,000 [R. T. 123]; Country Club Charcoal and Comstock Ltd. did *not* make a profit [R. T. 124, 133, 179]; *no one* aided Alison in the sale and production of charcoal [R. T. 125]; *no one* aided Alison in the financial area [R. T. 125]; *no* engineers re-evaluated the production problems [R. T. 131]; 6012-cord kilns were *never* built in the Paso Robles area [R. T. 133]; and the stumpage contracts which David Alison acquired [Exs. A and B], were the only assets traded by Country Club Charcoal to Comstock Ltd. [R. T. 128.]

Another press release was prepared by Raetz in early May of 1957. The press release and the charcoal brochure were sent to various news media in the Los Angeles area. [Ex. 7.]

In the latter part of June of 1957, messages were sent by teletype between the Denver office and the Beverly Hills office of H. Carroll & Co. concerning the charcoal brochure. Those teletypes read in pertinent part as follows:

"DEN IS BOB LEOPOLD TERE I WEED BROCHURES ON COMSTOCK LTD VERT BADKT BADLY PLEASE SEND US SME VIA AIR MAIL IF YOU HAVE SOUNE . . . OK I LOOK FOR SOME COMSTOCK BROCHURES AND GET THEM OUT TODAY . . ." [Ex. 47.]

". . . WE ARE SENDING SPECIAL DELIVERY ABOUT 50 COMSTOCK BROCHURES THAT IS ALL WE HAVE LEFT FORGOT WE SENT OURS TO NEW YORK . . ." [Ex. 46.]

". . . TELL BOB WE FINALLY GOT THE BROCH ON COMSTOCK AT 7 PM LAST NITE AND THEY PUT A FEW IN THE MAIL TO BOB ATTENTION SPEC AIR MAIL ADN BALANCE WILL FOLLOW TODAY THEY SURE ARE A TERRIFIC MAILING PIECE MAYBE THEY WORTH W WAITING FOR . . ." [Ex. 48.]

In April of 1957, Albert Bryer purchased 10,000 shares of Comstock Ltd. from Robert Alaska at 30 cents per share. Alaska told Bryer that Comstock Ltd. was a mining stock listed on the exchange, had land under option, and the price of Comstock Ltd. would double in six months. Alaska also showed Bryer the charcoal brochure. Alaska did not tell Bryer that his stock came from a Denver escrow at 25 cents per share and that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. [R. T. 424-425, 427-428, 440.]

Irving Marems sold Roberta Krell 10,000 shares of Comstock Ltd. in early 1957 at 30 cents per share. Prior to the sale Marems told Krell that Comstock Ltd. was a good stock, could double in price, and they were making a market. Prior to the purchase Krell was shown the charcoal brochure. Krell was not told

that the stock that she purchased came from a Denver escrow at 25 cents per share. [R. T. 559, 561-564.]

Mr. Willard Johnson purchased 1000 shares of Comstock Ltd. at 30 cents per share, in the latter part of April, 1957. Johnson purchased another 1000 shares of Comstock Ltd. at 32 cents per share, in the latter part of June, 1957. Milton Miller was the salesman from the Beverly Hills office of H. Carroll & Co. that Johnson dealt with. Prior to his first purchase Miller told Johnson that Comstock Ltd. was a good growth stock; had big orders; Carroll made the market and the stock would not go below the quoted price; Comstock Ltd. would go above 40 in a few weeks and would double in three to six months. Johnson did not know that his stock was purchased from a Denver escrow at 25 cents per share. [Exs. 68, 69; R. T. 409, 411, 413-414, 416, 418, 421.]

In the spring of 1957, Frank Hicks, a salesman for H. Carroll & Co., telephoned Robert Wisda and in discussing Comstock Ltd. said that the stock would go over $2.00 in the near future and that the stock was listed on the San Francisco Mining Exchange. Wisda purchased 500 shares of Comstock Ltd. at 32 cents per share. Wisda received his stock certificate dated May 27, 1957, from H. Carroll & Co. Wisda also received a receipt form dated May 31, 1957, from H. Carroll & Co. Wisda was shown the charcoal brochure and was also told that Carroll had a block of Comstock Ltd. but was not told that his stock came from an escrow in Denver at 25 cents per share. Likewise Wisda was not told that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. [Exs. 56, 94; R. T. 581-583, 587-588.]

Frank Hicks also sold Comstock Ltd. stock to Robert Indorf in May of 1957. Hicks told Indorf that the stock would go to around $1.00 per share from its price of 30 cents per share. Hicks also gave a charcoal brochure to Indorf. Hicks did not tell Indorf that H. Carroll & Co. had purchased the stock from a Denver escrow at 25 cents a share or that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. Indorf received his stock certificate dated June 20, 1957, in a brown H. Carroll & Co. envelope, postmarked June 27, 1957. [Exs. 60, 62; R. T. 591-594, 598.]

Elmo Moen sold Arnold Bloemsma 500 shares of Comstock Ltd. stock for $170. Moen showed Bloemsma the charcoal brochure prior to the sale. Moen did not tell Bloemsma that the Comstock Ltd. stock had been purchased from a Denver escrow at 25 cents a share or that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. Bloemsma received his stock certificate, dated June 17, 1957, in a brown H. Carroll & Co. envelope, postmarked June 21, 1957. [Exs. 67, 96; R. T. 601, 604-605, 608-610, 613.]

In the early part of June, 1957, John Llewellyn sold Marjorie Loar Graham 500 shares of Comstock Ltd. Graham was not told that H. Carroll & Co. purchased the stock that she bought from a Denver escrow at 25 cents a share or that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. [R. T. 617, 619.]

Raymond Wyatt purchased 2,500 shares of Comstock Ltd. at 30 cents per share and another 2,500 shares of Comstock Ltd. at 35 cents per share from

Jone Suttle. Suttle told Wyatt that the stock was being sold at the market price and was being purchased on the San Francisco Mining Exchange. Wyatt was not told that the stock was purchased from a Denver escrow at 25 cents a share or that H. Carroll & Co. was maintaining the price of Comstock Ltd. on the San Francisco Mining Exchange. [R. T. 663, 665, 667-668.]

Howard P. Carroll, in November of 1957, according to Marvin Greene, then an attorney for the Securities and Exchange Commission, stated that 500,000 shares of Comstock Ltd. had been transferred from Archie Chevrier to six individuals; the 500,000 shares of Comstock Ltd. were deposited in the Securities Transfer Corporation in Denver, Colorado; this deposit was under an arrangement whereby H. Carroll & Co. could withdraw these shares at 25 cents per share; and Howard Carroll said that he withdrew approximately 300,000 shares of Comstock Ltd. Howard P. Carroll also told Marvin Greene that during the same period of time he purchased shares of Comstock Ltd. on the San Francisco Mining Exchange. [R. T. 460-461.]

In April of 1962, Otto P. Gustte, an investigator for the Securities and Exchange Commission, contacted Howard P. Carroll at his office in Denver, Colorado, in an attempt to locate the purchase and sales journal of H. Carroll & Co. for the year 1957. At that time Howard P. Carroll told Gustte that the purchase and sales journal of H. Carroll & Co. had been burned at his direction in January of 1962. [R. T. 712-713.]

IV.

SUMMARY OF ARGUMENT.

A. The appellants' pre-trial motion to strike surplusage in the indictment was properly denied by the Trial Court.

B. The prosecution of Counts One, Five and Six of the indictment was not barred by the Statute of Limitations.

C. The testimony of Ralph Frank concerning a telephone call to H. Ward Dawson was properly received in evidence.

D. There was no error committed in the procedures employed by the Trial Court as to (1) alleged leading questions, (2) questions asked by the Trial Court, and (3) argument of objections in the presence of the jury.

E. There is sufficient evidence to sustain the conviction of the appellants on all counts. The charcoal brochure was materially false. The appellants made substantial purchases of Comstock Ltd. stock on the San Francisco Mining Exchange at prices ranging from 27 cents to 36 cents a share, while at the same time selling investors stock in Comstock Ltd. which had been withdrawn from a Denver escrow by the appellants at 25 cents per share.

F. The Trial Court did not err in the admission of documentary evidence in the case at bar.

G. The jury instructions were a complete concise statement of the law applicable to a case charging fraud in the sale of securities.

V.
ARGUMENT.

A. The Appellants' Pre-Trial Motion to Strike Surplusage in the Indictment Was Properly Denied by the Trial Court.

On October 29, 1962, two days before trial, the appellants filed a motion to strike certain language from the indictment as surplusage. [C. T. 91-96.] This motion was denied on October 30, 1962. [C. T. 131.] Appellants did not file a motion for Bill of Particulars.

A motion to strike allegations in an indictment as surplusage should not be granted unless it is clear that the allegations are not relevant and are prejudicial or inflammatory. *United States v. Bonnano* (D.C. S.D. N. Y. 1959), 177 F. Supp. 106, *rev'd* 285 F. 2d 408; *United States v. Garrison* (D.C. E.D. Wis. 1958), 168 F. Supp. 62d; *United States v. Oldham Company* (D.C. N.D. Cal. 1957), 152 F. Supp. 818; *United States v. Klein* (D.C. S.D. N. Y. 1954), 124 F. Supp. 476.

No showing was made to the Trial Court that the allegations complained of were irrelevant, prejudicial and inflammatory.

The Trial Court is allowed wide discretion in coping with motions to strike surplusage. *Gambill v. United States* (6 Cir. 1960), 276 F. 2d 180; *United States v. Courtney* (2 Cir. 1958), 257 F. 2d 944, *cert. den.* 358 U. S. 929.

The government respectfully submits that the Trial Court did not abuse its discretion in denying the motion to strike, which was filed two days prior to the commencement of trial.

B. The Prosecution of Counts One, Five and Six of the Indictment Was Not Barred by the Statute of Limitations.

The appellants contend that Title 18, United States Code, Section 3282, bars the prosecution and thus the conviction on Counts One, Five and Six must be reversed.[4]

The Grand Jury for the Southern District of California returned the indictment in this cause on May 23, 1962. [C. T. 2-12.]

Robert Wisda, the investor named in Count One, received a stock certificate for 500 shares of Comstock Ltd. dated May 27, 1957. [Ex. 94.] Wisda also received a receipt form from H. Carroll & Co. dated May 31, 1957. [Ex. 56.]

Investor Arnold Bloemsma, named in Count Five, received a stock certificate for 500 shares of Comstock Ltd. dated May 27, 1957. [Ex. 94.] Bloemsma also received a receipt form dated June 19, 1957. [Ex. 66.] The stock certificate and receipt form were mailed in a brown H. Carroll & Co. envelope, postmarked June 21, 1957. [Ex. 67.]

Robert Indorf, the investor named in Count Six, received a stock certificate for 500 shares of Comstock Ltd. dated June 20, 1957. [Ex. 64.] Indorf also received a receipt form dated May 27, 1957. [Ex. 61.] Indorf received the stock certificate and the receipt form in a brown H. Carroll & Co. envelope postmarked June 25, 1957. [Ex. 60.]

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[4]The trial court instructed the jury concerning the Statute of limitations. [R. T. 990.]

Title 15, United States Code, Section 77q(a), in pertinent part, reads as follows:

> "It shall be unlawful for any person in the *offer or sale of any securities* . . . by the use of the mails, directly or indirectly . . ." [Emphasis added.]

Title 15, United States Code, Section 77b(3), in pertinent part, reads as follows:

> "When used in this subchapter, unless the context otherwise requires— . . . (3) The term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value. The term 'offer to sell,' 'offer for sale,' or 'offer' shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. . . ."

The delivery of the security itself and the receipt form is a part of the sale. *United States v. Sampson* (1962), 371 U. S. 75; *Creswell-Keith, Inc. v. Willingham* (8 Cir. 1959), 264 F. 2d 76; *Schiller v. H. Vaughan & Co.* (2 Cir. 1943), 134 F. 2d 875; *Kopald-Quinn & Co. v. United States* (5 Cir. 1939), 101 F. 2d 608, *cert. den.* 307 U. S. 628; *United States v. Robertson* (D.C. S.D. N. Y. 1959), 181 F. Supp. 188, *aff'd* in part *rev'd* in part 298 F. 2d 739; *United States v. Monjar* (D.C. Del. 1942), 47 F. Supp. 421, *aff'd* 147 F. 2d 916, *cert. den.* 325 U. S. 859.

Delivery of the security is part of a sale of said security. Accordingly, the Government respectfully submits that the prosecution on Counts One, Five and Six was not barred by the Statute of Limitations.

C. The Testimony of Ralph Frank Concerning a Telephone Call to H. Ward Dawson Was Properly Received in Evidence.

During early 1957 Ralph Frank, an attorney who represented Howard P. Carroll and H. Carroll & Co. in California, had a telephone conversation with H. Ward Dawson, a San Francisco attorney who represented David Alison. Dawson talked to Frank about the charcoal brochure, a plan for issuance or sale of stock relating to Comstock Ltd., and a block of 500,000 shares of Comstock Ltd. [R. T. 684-687.]

This conversation is not hearsay because it was not offered for the truth of the matters asserted, but was merely introductory and offered to show the context within which Dawson and Frank were acting in relation to the appellants and the scheme to defraud. *Ortiz v. United States* (9 Cir. June 5, 1963), ... F. 2d ....., Number 18,253; *Busby v. United States* (9 Cir. 1961), 296 F. 2d 328.

However, if the telephone conversation is held to be hearsay it was still admissible under the "common scheme or plan" exception. In *Hitchman Coal & Coke Co. v. Mitchell* (1917), 245 U. S. 229, it was stated that:

> ". . . when any number of persons associate themselves together in prosecution of a common plan or enterprise, lawful or unlawful, from the very act of associating there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act

of all, and is admissible as primary and original evidence against them." p. 249.[5]

H. Ward Dawson was (1) the attorney for David Alison, (2) prepared the notes relating to the 500,000 shares of Comstock Ltd., (3) received 500,000 shares of Comstock Ltd. in early 1957, (4) delivered the 500,000 shares of Comstock Ltd. to David Alison, (5) attended a Comstock Ltd. meeting in Reno, Nevada, (6) received funds from Howard P. Carroll, (7) authorized Howard P. Carroll to withdraw Comstock Ltd.'s stock from the Denver escrow, (8) the Comstock Ltd. stock was withdrawn by Howard P. Carroll at the rate of one share for 25 cents paid to Dawson, and (9) Dawson forwarded the money received from Howard P. Carroll to David Alison. Ralph Frank was (1) the attorney for Howard P. Carroll and H. Carroll & Co. in California, (2) Frank was the resident agent for H. Carroll & Co. in California, (3) Frank represented H. Carroll & Co. before the California Corporation Commission, (4) Frank attended various meetings at the Beverly Hilton hotel concerning H. Carroll & Co., including the sales meeting relating to Comstock Ltd., (5) Frank examined a mock-up of the charcoal brochure, (6) Frank presented the charcoal brochure to the California Corporation Commission for approval as selling literature, (7) Frank was informed by the California Corporation Commission that the brochure was disapproved as selling literature, and (8) Frank advised Howard P. Car-

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[5]See also: *Lutwak v. United States* (1953), 344 U. S. 604; *Ortiz v. United States, supra; Williams v. United States* (9 Cir. 1961), 289 F. 2d 598; *Fuentes v. United States* (9 Cir. 1960), 283 F. 2d 537.

roll and H. Carroll & Co. on the Comstock Ltd. stock venture.[6]

It is to be noted that not withstanding the analysis previously presented the conversation between Frank and Dawson was merely cumulative of other testimony concerning the charcoal brochure and the block of 500,000 shares of Comstock Ltd.

The Government respectfully submits that the conversation between Frank and Dawson (1) was not hearsay, (2) if hearsay was subject to an exception to the hearsay rule, and (3) was merely cumulative.

D. There Was No Error Committed in the Procedures Employed by the Trial Court.

1. Leading Questions.

The appellants contend that counsel for the Government committed reversible error by asking leading questions.

The definition of a leading question is found in Wigmore on Evidence, Third Edition, Volume III, Section 769, and reads, in pertinent part, as follows:

> "LEADING QUESTIONS: (1) GENERAL PRINCIPLE. On the direct examination, i.e. by counsel of the party in whose favor the witness is called, the most important peculiarity of the interrogational system is that it may be misused by *suggestive questions* to supply a false memory for the witness,—that is, to suggest desired answers not in truth based upon a real recollection. The problem is to discriminate between the forms of questions which will too probably have that

[6]See Court's instructions on "common scheme or plan" and on "agency." [R. T. 992-995.]

> effect and those which will not. Questions may legitimately suggest to the witness the *topic* of the answer; they may be necessary for this purpose where the witness is not aware of the next answering topic to be testified about, or where he is aware of it but its terms remain dormant in his memory until by the mention of some detail the associated details are revived and independently remembered. Questions, on the other hand, which so suggest the *specific tenor of the reply as desired by counsel* that such a reply is likely to be given irrespective of an actual memory, are illegitimate.
>
> "The essential notion, then, of an improper (commonly called a leading) question is that of a question which *suggests the specific answer desired.* . . ." [Footnote omitted.] p. 122.

A close examination of the questions asked by counsel for the Government leads to the conclusion that the questions did not in the main suggest the specific answer desired.

The general rule is that the trial court has a wide discretion in permitting or forbidding leading questions. A conviction will not be reversed except where the Trial Court has grossly abused this discretion. *Northern Pacific RR Co. v. Urlin* (1895), 158 U. S. 271; *St. Clair v. United States* (1894), 154 U. S. 134; *City-Wide Trucking Corporation v. Ford* (D.C. Cir. 1962), 306 F. 2d 805; *Mitchell v. United States* (9 Cir. 1954), 213 F. 2d 951, *cert. den.* 348 U. S. 912; *United States v. Montgomery* (3 Cir. 1942), 126 F. 2d 151, *cert. den.* 316 U. S. 68; and Wigmore on Evidence, Third Edition, Volume III, Section 770.

It is to be noted that many of the witnesses called by the Government were friends, employees and business associates of Howard P. Carroll. The demeanor of the witnesses was accurately summarized by the Trial Court's statement, out of the presence of the jury, that:

> ". . . Counsel has had a pretty difficult time with some of these witnesses. I have seen a good many witnesses in the courtroom and I have seen rare occasions where there were more evasive witnesses than we had in this case. An occasion may come to deal with that later, I don't know. . . ." [R. T. 636.][7]

The Government respectfully submits that the Trial Court did not abuse its discretion in its rulings on objections directed to the form of questions asked in the case at bar.

2. Questions by the Trial Court.

Appellants contend that the Trial Court committed error by participating in the trial and by evidencing his belief in the guilt of the defendants by assisting the prosecution in the presentation of the case on trial.

The general rule concerning the Trial Court's questioning of witnesses is found in *Ochoa v. United States* (9 Cir. 1948), 167 F. 2d 341, and reads as follows:

> ". . . it is the right and duty of the Federal trial judge to facilitate, by direct participation, the orderly progress of a trial. Queries by the judge which aid in clarifying the testimony of witnesses, expedite the examination or confine it to relevant matters in order to arrive at the ulti-

[7]See also R. T. 231-233, 823.

> mate truth, are eminently proper so long as this authority is exercised in a nonprejudicial manner. . . . p. 344. [Citations omitted.][8]

An examination of the record in this cause shows that the Trial Court asked questions of the various witnesses in order to (1) clarify witness testimony, (2) expedite the examination of witnesses, and (3) in order to confine the examination of witnesses in order to arrive at the ultimate truth.[9]

Appellents rely on the cases of *Bollenbach v. United States* (1946), 326 U. S. 607; *United States v. Fry* (7 Cir. 1962), 304 F. 2d 296; *United States v. Marzano* (2 Cir. 1945), 149 F. 2d 923; *Gomila v. United States* (5 Cir. 1944), 146 F. 2d 372; *Williams v. United States* (9 Cir. 1937), 93 F. 2d 685.

In the *Bollenbach* case, *supra,* the Supreme Court reversed because of an improper jury instruction. In the *Fry* case, *supra,* the Trial Court asked over 1210 questions which ridiculed the defendant and his witnesses, and led the appellate court to the conclusion that the Trial Court believed the defendant was guilty. In the *Marzano* case, *supra,* the Trial Court called two codefendants who had pleaded guilty as witnesses and the Trial Court by its extensive examination of the two codefendants led the appellate court to the conclusion that the Trial Court disbelieved the two co-

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[8]See also: *United States v. Rosenberg* (2 Cir. 1952), 195 F. 2d 583, *cert. den.* 344 U. S. 838; *Pariser v. City of New York* (2 Cir. 1945), 146 F. 2d 431; *United States v. Warren* (2 Cir. 1941), 120 F. 2d 211; and Wigmore on Evidence, Third Edition, Volume III, Section 784.

[9]The Trial Court's examination of witnesses and the objections of counsel was the subject of a lengthy jury instruction. [R. T. 995-997.]

defendants and thus the defendant on trial was guilty. In the *Gomila* case, *supra,* the Trial Court erred in (1) an instruction concerning the presumption of innocence, (2) the procedure for handling the written question of the jury after deliberations had commenced, and (3) the extensive examination of an informer; which led the appellate court to conclude that the judge indicated to the jury his opinion that the defendants were guilty. In the *Williams* case, *supra,* one-third of the transcript (220 out of 675 pages), was examination by the Trial Court of various witnesses which included extensive examination of the defendants. In the *Williams* case, *supra,* this Court found error in the jury instructions, and error in the extensive participation of the Trial Court which conveyed to the jury the Trial Court's insistence on a conviction.[10]

The Government respectfully submits that the Trial Court in examining witnesses did not exceed the bounds of propriety in this case and the authority presented by the appellants is not applicable to the case at bar.

3. Argument of Objections.

Appellants contend that the Trial Court erred in requiring that arguments concerning the admissibility of evidence be made in the presence of the jury. The case authority which appellants rely on to sustain their position relates to extensive *witness testimony* concerning the validity of searches and seizures or the voluntary or involuntary nature of a confession. *Eierman v. United States* (10 Cir. 1930), 46 F. 2d 46, and cases cited.

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[10]The case of *Williams v. United States* (9 Cir. 1937), 93 F. 2d 685, is analyzed in Wigmore on Evidence, Third Edition, Volume III, Section 784, p. 153, footnote 2.

The Government submits that the *Eierman* case, *supra,* does not control the case at bar but rather the case of *Holt v. United States* (1910), 218 U. S. 245, controls. In the *Holt* case, *supra,* it was stated that:

> ". . . we are of opinion that it was within the discretion of the judge to allow the jury to remain in court. . . . No doubt the more conservative course is to exclude the jury during the consideration of the admissibility of confessions, but there is force in the judge's view that if juries are fit to play the part assigned to them by our law they will be able to do what a judge has to do every time that he tries a case on the facts without them, and we cannot say that he was wrong in thinking that the men before him were competent for their taste." pp. 249-250.[11]

The Supreme Court of the United States has held that matters of law concerning the admission or rejection of evidence may properly be considered by the Court and counsel for the respective parties while the jury is present.

This holding applied to the case before this Court leads to the conclusion that the Trial Court did not commit error in the procedures employed relating to the arguments of counsel concerning admission and rejection of evidence.

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[11]See also: *United States v. Varlack* (2 Cir. 1955), 225 F. 2d 665; *Keeney v. United States* (D. C. Cir. 1954), 218 F. 2d 843; *United States v. Holt* (Cir. Ct. W.D. Wash. 1909), 168 Fed. 141; and Cyclopedia of Federal Procedure, Third Edition, Volume 12, Section 48.121.

E. There Is Sufficient Evidence to Sustain the Conviction of the Appellants on All Counts.

Appellants contend that there is insufficient evidence to sustain their conviction.

It is of course a fundamental principle of law that all questions of credibility are for the trier of fact and not for the Appellate Courts. *Glasser v. United States* (1942), 315 U. S. 60; *Jelaza v. United States* (4 Cir. 1949), 179 F. 2d 202.

In determining whether the evidence is sufficient to sustain the conviction of the appellants, this Court is required to view the evidence in the light most favorable to the Government. *Glasser v. United States, supra* and *Mosco v. United States* (9 Cir. 1962), 301 F. 2d 180.

The evidence shows that the charcoal brochure was materially false. The charcoal brochure was paid for by Howard P. Carroll and was used extensively by the Beverly Hills Office of H. Carroll & Co. as selling literature.

Notwithstanding the charcoal brochure it is clear that material facts were concealed from the investors in Comstock Ltd. stock. 15 U. S. C. 77q(a)(2).

The investors were *not* told that Howard P. Carroll and H. Carroll & Co. purchased a substantial majority of the shares of Comstock Ltd. stock sold on the San Francisco Mining Exchange during the period alleged in the indictment at prices ranging from 27 cents to 36 cents per share.

Likewise the investors were *not* told that the Comstock Ltd. stock which they purchased from Howard

P. Carroll and H. Carroll & Co. came from a Denver escrow at 25 cents a share.

The activity on the San Francisco Mining Exchange coupled with the Denver escrow activity were facts which were concealed from the investors by Howard P. Carroll and H. Carroll & Co. This concealment was an ". . . omission to state a material fact . . ." 15 U. S. C. 77q(a)(2). *Coplin v. United States* (9 Cir. 1937), 88 F. 2d 652, *cert. den.* 301 U. S. 703.

The Government respectfully submits that there is overwhelming evidence of the guilt of Howard P. Carroll and H. Carroll & Co.

F. The Trial Court Did Not Commit Error in the Admission of Documentary Evidence.

1. Exhibit One.

Appellants contend that the Trial Court erred in receiving Exhibit One in evidence. Exhibit One is a carbon copy of six notes that David Alison delivered to Archie Chevrier. In return for the six notes Chevrier delivered 500,000 shares of Comstock Ltd. to Alison. This block of Comstock Ltd. stock ended up in a Denver escrow and Howard P. Carroll withdrew over 300,000 shares at 25 cents per share. The stock which Howard P. Carroll withdrew was sold to investors, primarily in the Los Angeles area. [R. T. 460-461, 715-716.]

In explaining this transaction to Marvin Greene, then an attorney employed by the Securities Exchange Commission, Howard P. Carroll mentioned the six notes.

The Government respectfully submits that Exhibit One was properly received in evidence to show the

background concerning the 500,000 shares of Comstock Ltd. in issue in this case. No authority contrary to the position of the Government has been presented for this Court's consideration by the appellants.

2. Exhibit 22.

Appellants contend that the Trial Court erred in receiving Exhibit 22 in evidence. Exhibit 22 is a letter written by a San Francisco attorney to Marvin Greene, formerly an attorney for the Securities Exchange Commission. Exhibit 22 was furnished at the request of Marvin Greene in order that the Securities Exchange Commission might determine the numbers of the stock certificates which comprised the 500,000 shares of Comstock Ltd. escrowed in Denver, Colorado.

Exhibit 22 was kept by the San Francisco office of the Securities and Exchange Commission in the ordinary course of business. The appellants objected to the admission of Exhibit 22 on the basis that it was (1) hearsay and (2) there was no proper foundation. [R. T. 460-465.]

The appellants do not contend, in light of Exhibit 27, that the information contained in Exhibit 22 is false, or that the 500,000 shares of Comstock Ltd. listed in Exhibit 22 were not ultimately placed in a Denver escrow. Rather appellants take the position that the technical requirements of Title 28, United States Code, Section 1732, were not complied with and therefore the entire case must be reversed.

In the case of *Bisno v. United States* (9 Cir. 1961), 299 F. 2d 711, this Court was faced with the following fact situation: *Bisno* had certain correspondence files which formed a part of his business records. Some

of the letters in the correspondence files were not written by *Bisno* but by other individuals. *Bisno* contended that Title 28, United States Code, Section 1732, did not apply to letters written by someone else and which were kept in his business file. In reply to this contention this Court stated that:

> ". . . We do not regard the Official Records Act as being so restrictive. This act permits the introduction into evidence of 'any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, or occurrence, or events * * * if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.' The mere fact that the memoranda taken from chronological files are in the form of letters does not operate to remove the material in Exhibits 58A-65A from the Official Records Act. Neither does the fact that some of the letters were not written by Bisno himself affect the admissibility of such letters under the act, since that act provides 'all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.'" p. 718.

The Government respectfully submits that the *Bisno* case, *supra,* controls and Exhibit 22 was properly received in evidence. However, if this Court were to restrict the holding in the *Bisno* case, *supra,* the ad-

mission of Exhibit 22 was harmless error because it was merely cumulative of other evidence.

The information found in Exhibit 22 is also found in Exhibit 27, which was identified by Clarence Scholz as containing receipts which he gave Securities Transfer Corporation for the shares of Comstock Ltd. stock that appellants withdrew from the escrow at 25 cents per share. These receipts contain the numbers of the stock certificates withdrawn by the appellants. The stock certificate numbers provide the basis for tracing the shares of stock purchased by the investors named in the indictment to the escrow at Securities Transfer Corporation.[12]

The conclusion of harmless error is supported by the case of *Gordon v. United States* (6 Cir. 1948), 164 F. 2d 855, *cert. den.* 333 U. S. 862. In the *Gordon* case, *supra,* the Court stated:

> "We question whether the letter written by Walter Ollendorff to his brother, an officer of the Ollendorff Watch Company, with reference to this robbery was properly introduced in evidence. It was admitted upon the ground that it was made in the regular course of business within the meaning of 28 U.S.C. § 695.
>
> "The alleged report was a highly personal account, written in familiar terms. While it stated the approximate number of pieces lost, as reported by Walter Ollendorff to the insurance agent, it hardly bore the ear-marks of a business report. Appellant contends that under the doctrine of

[12]See Exhibit 28 which contains the same information as found in Exhibit 22.

> Palmer v. Hoffman, . . . no report of a jewelry loss is admissible under 28 U.S.C. 695, . . . Appellee urges that reports of thefts of jewelry stock are necessarily made in the systematic conduct of the jewelry business and that the letter was thus clearly admissible.
>
> "We see some factual distinction between the situation presented here and in Palmer v. Hoffman, . . . It is the business of a jewelry company to sell its goods, and reports of losses of its stock would appear to be not only a necessary, but an integral part of the business itself. The letter in question is not, however, typical of entries 'made systematically or as a matter of routine,' and we therefore conclude that within the rule in Palmer v. Hoffman, . . . the evidence was not competent. Its admission was in no way prejudicial, for it was merely cumulative of other competent and unimpeached testimony." p. 858.[13]

3. Exhibits 28, 29, 30 and 31.

The appellants contend that the Trial Court erred by receiving Exhibits 28, 29, 30 and 31 in evidence.

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[13]See *Bailey v. United States* (9 Cir. 1960), 282 F. 2d 421, *cert. den.* 365 U. S. 228; *Stevens v. United States* (9 Cir. 1958), 256 F. 2d 619; *Papadakis v. United States* (9 Cir. 1953), 208 F. 2d 945; *Stillman v. United States* (9 Cir. 1949), 177 F. 2d 607; *Haid v. United States* (9 Cir. 1946), 157 F. 2d 630; *Coplin v. United States* (9 Cir. 1937), 88 F. 2d 652, *cert. den.* 301 U. S. 703; *United States v. Simmons* (2 Cir. 1960), 281 F. 2d 354; *United States v. Morello* (2 Cir. 1957), 250 F. 2d 631; *United States v. Quong* (6 Cir. 1962), 303 F. 2d 499, *cert. den.* 371 U. S. 863; *Thomas v. United States* (8 Cir. 1960), 281 F. 2d 132, *cert. den.* 364 U. S. 904; *Finnegan v. United States* (8 Cir. 1953), 204 F. 2d 105, *cert. den.* 346 U. S. 821; *Hartzell v. United States* (8 Cir. 1934), 72 F. 2d 569, *cert. den.* 293 U. S. 621.

Exhibits 28, 29, 30 and 31 are the records of Nevada Transfer Agency relating to the various stock transfers of Comstock Ltd. The appellants stipulated that the exhibits previously referred to are a part of the official records of Nevada Transfer Agency relating to Comstock Ltd.

The appellants objected to the admission of the exhibits because of (1) the best evidence rule and because (2) the exhibits are not within the purview of Title 28, United States Code, Section 1732. The Trial Court received the exhibits in question for the limited purpose of showing the flow of Comstock Ltd.

Appellants rely on *Neiderkrome v. C.I.R.* (9 Cir. 1958), 266 F. 2d 238. In the *Niederkrome* case, *supra,* the Tax Court admitted in evidence the minutes of a meeting of the executive committee of a corporation not connected in any way to the appellants. No testimony was elicited that the minutes were the minutes of the executive committee. The minutes received in evidence concerned a loan which had not been consummated and which was only in the negotiation stage. The loan involved in the minutes was not carried out in the form outlined in the minutes.

In this case the exhibits refer specifically to Howard P. Carroll and H. Carroll & Co. and the shares of Comstock Ltd. handled by H. Carroll & Co. The *Neiderkrome* case, *supra,* dealt with records relating to a corporation in no way connected to the appellant, while this case concerns records which clearly relate to Howard P. Carroll and H. Carroll & Co. and in particular Comstock Ltd.

The Government respectfully submits that the exhibits in question were properly received under Title 28, United States Code, Section 1732.[14]

4. Exhibits 18 and 104.

Appellants contend that the Trial Court erred in receiving Exhibit 18 and Exhibit 104 in evidence. Exhibit 18 is a series of H. Carroll & Co. confirmations relating to the order of Comstock Ltd. stock by Howard P. Carroll and H. Carroll & Co. on the San Francisco Mining Exchange. Exhibit 18 was identified by Liboslav Uhlir, an accountant for H. Carroll & Co. during 1957, as similar to the confirmations that crossed his desk. Gaither Lowenstein, an employee of Archie Chevrier during 1957, identified Exhibit 18 as the corresponding broker to the trades which Archie Chevrier confirmed. Lowenstein said that Exhibit 18 was Archie Chevrier's confirmation. Exhibit 18 was objected to by the appellants on the basis of no proper foundation and hearsay. The Trial Court ruled that sufficient foundation had been laid to connect the appellants to Exhibit 18, and it was received in evidence. [R. T. 706-711, 733-734.]

The Government respectfully submits that the Trial Court did not err in receiving Exhibit 18 in evidence in that Uhlir stated similar confirmations crossed his desk when employed by H. Carroll & Co. and Lowenstein identified Exhibit 18.

Exhibit 104 is a group of documents consisting of receipt copies which are mailed with securities, confirmations of trades and the draft attached of the

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[14]See: *Stillman v. United States* (9 Cir. 1949), 177 F. 2d 607.

securities which were mailed on the pink copy. Lowenstein identified Exhibit 104 as part of the records of Archie Chevrier which were kept in the ordinary course of business. The appellants objected to Exhibit 104 on the grounds that there was no foundation and the exhibit was not material, relevant, or competent to prove any matter in issue. [R. T. 727-729.]

There can be no doubt that the requirements of Title 28, United States Code, Section 1732, were complied with as to Exhibit 104. *Bisno v. United States, supra.* Exhibit 104 was a record of Archie Chevrier kept in the ordinary course of business.

Of course Exhibit 104 was relevant, competent and material to show the activity of Howard Carroll and H. Carroll & Co., during the period alleged in the indictment, on the San Francisco Mining Exchange, while at the same time withdrawing stocks from a Denver escrow at 25 cents per share.

The Government respectfully submits that Exhibits 18 and 104 were properly received in evidence.

5. Exhibits 105 and 106.

The appellants contend that the Trial Court erred in the admission of Exhibit 105 and the testimony of Howard Sillick, an employee of the Securities and Exchange Commission, concerning Exhibit 105. Exhibit 105 was compiled primarily from Exhibit 31, part of the records of Nevada Transfer Agency. [R. T. 741, 743, 773.] Exhibit 105 traces the shares of stock received by the investor witnesses to its place of origin. The tracing process shows that the stock received by the investor witnesses was purchased from Securities Transfer Corporation, the organization which handled

the escrow of 500,000 shares of Comstock Ltd. which Howard P. Carroll had the option to withdraw at 25 cents per share.

The Trial Court instructed the jury thoroughly on the impact of an accountant's testimony in the case at bar. The Trial Court detailed the fact that the testimony of an accountant is only explanatory of documents and other testimony received in evidence. The Trial Court clearly informed the jury that the summaries made by an accountant are not in and of themselves evidence. The Trial Court also instructed the jury to disregard the summaries of an accountant if they are inaccurate. [R. T. 767, 989-990.]

Any inaccuracy which appears in Exhibit 105 is for the consideration of the jury. Cross-examination is the proper method of pointing out an inaccuracy in an accountant's summary.

The Government submits that the summary presented in Exhibit 105 was properly received in evidence. *Corbett v. United States* (9 Cir. 1956), 238 F. 2d 557; *Noell v. United States* (9 Cir. 1950), 183 F. 2d 334, *cert. den.* 340 U. S. 921.[15]

Exhibit 106 is a compilation of Exhibit 104, the records of Archie Chevrier concerning purchases by Howard P. Carroll and H. Carroll & Co. on the San Francisco Mining Exchange during the period alleged in the indictment, and Exhibits 32, 33, 34, 79, and 104, the records of the San Francisco Mining Exchange concerning the total sales of Comstock Ltd. stock dur-

[15]Even if Exhibit 22 was not properly received in evidence the Government submits that Exhibit 27, and the harmless error analysis previously considered controls.

ing the period alleged in the indictment on the San Francisco Mining Exchange. [R. T. 755, 758.]

Again, inaccuracy in this type of compilation raises a question for the jury and is the proper subject of cross-examination.

Exhibit 106 shows that the appellants purchased over 80,000 shares of Comstock Ltd. stock out of total sale of over 130,000 shares of Comstock Ltd. stock during the period alleged in the indictment. These purchases coupled with the testimony concerning the Denver escrow during the period alleged in the indictment show fraud in the sale of securities on the part of Howard P. Carroll and H. Carroll & Co. *Coplin v. United States* (9 Cir. 1937), 88 F. 2d 652, *cert. den.* 301 U. S. 703.

The Government respectfully submits that Exhibit 106, as well as Exhibit 105, was properly received in evidence by the Trial Court.

G. The Trial Court Did Not Commit Error in Its Instructions to the Jury.

The appellants contend that the Trial Court erred in failing to give favorable defense instructions. Of course the issue is not whether or not the Trial Court failed to give favorable defense instructions (or favorable Government instructions), but whether or not the instructions given were a correct and complete statement of the applicable law.

After the Trial Court finished instructing the jury, counsel for the appellants requested that certain additional instructions be given. The Trial Court recalled the jury and the additional requests by counsel for the appellants were given the jury. Counsel for the ap-

pellants did not object to the instructions given. In fact counsel for the appellants stated his satisfaction with the jury charge. [R. T. 1001-1011.]

Since there was no objection made to the jury charge the only question before this Court is whether or not the instructions when taken as a whole and read together indicate that the Trial Court committed plain error. Federal Rules of Criminal Procedure, Rule 30; *Walker v. United States* (9 Cir. 1962), 298 F. 2d 217.

The Government respectfully submits that the jury instructions, when taken as a whole and read together, show that the Trial Court in a clear and concise fashion accurately instructed the jury concerning the law applicable to fraud in the sale of securities.

VI.
CONCLUSION.

The Government respectfully submits that the jury verdict convicting the appellants on all counts should be affirmed by this Court.

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JOHN A. MITCHELL,
Assistant United States Attorney,

NO. 18551

United States Court Of Appeals

NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANTS

Appeal from the United States District Court for the
Southern District of California,
Central Division

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NO. 18551

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANTS

Appeal from the United States District Court for the
Southern District of California,
Central Division

STATEMENT OF THE CASE

The Appellee's Answer Brief is replete with argument and contains certain misstatements of the record which require correction. The Appellants have no quarrel with the Appellee's statement of the pleadings and facts disclosing jurisdiction and the statutes involved. However, the Appellants cannot accept the Appellee's statement of facts which was offered for this Court's consideration.

Manipulation was not in fact charged as the Appellee sets forth nor does the record reflect evidence which would show that Country Club Charcoal of California was a defunct company. No evidence establishes the presence of an escrow or the terms of the escrow at

The Securities Transfer Corporation in Denver, Colorado. The government relies wholly on Exhibit 22 to bring about their conclusion that 313,000 shares of escrowed stock were sold, and the admissibility of that exhibit is seriously in question. No connection would place Howard P. Carroll or H. Carroll & Co. in the position where responsibility could attach to them for the preparation of the ubiquitous brown brochure, nor does the record reflect any connection between Howard P. Carroll and David Alison in the formation of Country Club Charcoal of California or Country Club Charcoal of Nevada. H. Carroll & Co. was an over-the-counter dealer that had as its officers Howard P. Carroll, as president, Robert Leopold, vice-president, and Gerald M. Greenberg, secretary-treasurer (R. 255, 313, 336). In examining the record, nothing appears which would tie Howard P. Carroll into the merger of Country Club Charcoal into Comstock, Ltd. by David Alison. The opening brief analyzes the record as to the representations which are charged as being false.

In replying to the Argument which has been placed before the Court by the Appellee, the Appellants will follow the order set forth by the Appellee, even though the Appellee has elected to disregard the order of the argument set forth in the opening brief, which was an apparent attempt to postpone the recognition of the obvious inadmissibility of Exhibit 22.

REPLY TO APPELLEE'S ARGUMENT

A. The Appellants' pre-trial motion to strike surplusage in the indictment was improperly denied by the trial court.

The motion to strike was properly filed in the trial court, and no objection was made by the Appellee or by the court as to the time of filing. The allegations complained of in the indictment were on their face shotgun statements which were made to avoid the specificity required in pleading a criminal charge. When allegations are on their face irrelevant, prejudicial, and inflammatory no further showing need be made. United States v. Bonnano, 177 F. Supp. 106 (D.C. S.D. N.Y. 1959); United States v. Pope, 189 F. Supp. 12 (D.C. S.D. N.Y. 1960).

It is respectfully submitted that the trial court erred in denying the motion to strike.

B. The prosecution of Counts One, Five and Six of the indictment was barred by the Statute of Limitations.

It is admitted by the Appellee in their brief that the only transaction between the defendants and the Count One, Five and Six purchasers was the mailing of a stock certificate after the sale was consummated. With the stock certificate was a receipt form which was to be executed by the purchaser and returned to the defendant corporation. The question for determination was thus narrowed to whether or not the term "sale", as used in Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), includes delivery after

sale. In short, does delivery after the sale has been completed and the consideration paid show the date on which "such offense shall have been committed"? It is interesting to note that the cases cited by the Appellee on page 20 of their brief do not stand for the proposition for which they are cited. It is apparent from all cases cited, as well as the definition of the term "sale" itself, that the term "sale" is not synonymous with the term "delivery after sale," nor is the term "disposition" synonymous with the term "delivery." Of the six cases cited by the Appellee, four cases are criminal and two are civil. The two civil cases, Creswell-Keith, Inc. v. Willingham, 264 F.2d 76 (8th Cir. 1959), and Schiller v. H. Vaughan Clarke & Co., 134 F.2d 875 (2nd Cir. 1943), merely provide authority for the proposition that the use of the mails for delivery after sale confers jurisdiction, and additional cases appear in the Appellants' brief to support the well-established jurisdictional basis for a mail fraud case. None of the cases cited assist in determining whether or not delivery is necessary to complete the offense. The Creswell case stated clearly that "mails and interstate commerce provision is inserted only for jurisdictional purposes," and the Court's jurisdiction is not questioned in this case.

Of the four criminal cases cited, United States v. Sampson, 371 U.S. 75 (1962); Kopald-Quinn & Co. v. United States, 101 F.2d 528, cert. den. 307 U.S. 628 (5th Cir. 1939); United States v.

Robertson, 181 F. Supp. 158, aff'd. in part, rev'd. in part 298 F.2d 739 (D.C. S.D. N.Y. 1959); and United States v. Monjar, 47 F. Supp. 421, aff'd. 147 F.2d 916, cert. den. 325 U.S. 859 (D.C. Del. 1942), the Sampson case relates to mail fraud only. In a mail fraud case, mails must be used "for the purpose of executing" the scheme. In that case, letters delivered by the mails after receipt of payment in an "advance fee" scheme were considered to be "lulling letters" and thus necessary "for the purpose of executing" the scheme. Delivery of a stock certificate, or any security for that matter, was not involved. The cases of Kopald-Quinn & Co. v. United States, supra; United States v. Robertson, supra, and United States v. Monjar, supra, are all cases arising, at least in part, under Section 17(a) of the Securities Act. The Kopald case makes no reference whatsoever to a sale including delivery after sale. In the Monjar case, the only reference to the use of mails relates to written confirmations of sales, which for the purpose of this case is not an issue, since it is clear that confirmation of the sales were sent more than five years prior to the finding of the indictment. In the Robertson case some assistance is given to the court in the definition of the term "sale." It is clear in the Robertson case, that in a Securities Act fraud the purpose of the scheme was to be paid, and once payment was received, the scheme was completed without delivery. Judge Hurlands, at page 163, states:

> "In that respect it seems correct to say that the seller regards his bargain equivalent as the money obtained when the check is collected and that the purchaser victim suffers his actual injury when his bank account is charged with the check given in payment." United States v. Robertson, 181 F. Supp. 158, 163 (C.C. S.D. N.Y. 1959).

Congress, in its drafting of the Securities Act, did not see fit, in either Section 17 (the fraud and the sale section) or in Section 2(3) (the definition section) to include delivery after sale in the definition of sale. It is here important to note that in Section 5 of the Securities Act of 1933 (the registration section) a separate and distinct violation is set forth as follows: "to carry or cause to be carried through the mails or in interstate commerce by any means or instruments of transportation any such security for the purpose of sale or for delivery after sale." It thus appears clear that the object of any fraudulent sale of securities has "been committed" at such time as offer and acceptance, with payment, has been made and that subsequent delivery after sale, while perhaps conferring jurisdiction, would not toll the statute of limitations.

C. The testimony of Ralph Frank concerning a telephone call to H. Ward Dawson was improperly received in evidence.

The Dawson-Frank conversation was not introductory and was offered to establish the truth of the matters asserted therein. Busby v. United States, 296 F.2d 328 (9th Cir. 1961), does not

supply authority for the admission of the evidence. In the Busby case, testimony was admitted for the sole purpose of showing the basis for an investigation centering around a robbery, and the limitation of the purpose for the admission of the testimony appears clearly in the case. Busby v. United States, 296 F.2d 328, 332 (9th Cir. 1961).

Moreover, the common scheme or plan exception does not come into play until independent evidence establishes a combination or a conspiracy. To make the common scheme or plan exception applicable, the government would have to place dawson and Frank in the position of co-conspirators. Independent evidence does not appear which would make the scheme, plan, or design exception applicable.

D. There was error committed in the procedures employed by the trial court.

For the sake of brevity and because all of the points raised by the Appellee were fully covered in the opening brief, the selective points set out by the Appellee will not be answered. An examination of the record discloses that warning after warning was given on leading questions and that the prosecution presented nearly all of its evidence by the use of leading questions with their parrot-like answers. The action of the United States Attorney was frequently criticized by the court, and as a result of the leading questions, the court took an active

part in the trial of the prosecution's case. In the very case cited by the Appellee, Ochoa v. United States, 167 F.2d 341 (9th Cir. 1948), this Court recognized the danger of the judge assuming or appearing to assume the role of an advocate and of the necessity of the court's assiduously maintaining an attitude of judicial impartiality between the accused and the accuser. It is apparent that this Court has made it abundantly clear that the trial must be conducted in an atmosphere as antiseptic as that of the operating room. An examination of the record will disclose that such an atmosphere did not exist during the time that Howard P. Carroll and H. Carroll & Co. were standing trial. The case of Holt v. United States, 218 U.S. 245 (1910), which is cited by the Appellee, was decided prior to the case of Eierman v. United States, 46 F.2d 46 (10th Cir. 1930), and when closely read, contains the following analysis of the court's reasoning:

> "Technically the offer of the evidence had to be made in their presence before any question excluding them could arise. They must have known, even if they left the Court, that statements relied on as admitting part or the whole of the Government's case were offered. The evidence to which they listened was simply evidence of facts deemed by the judge sufficient to show that the statements, if any, were not freely made, and it could not have prejudiced the prisoner." Holt v. United States, 218 U.S. 245, 249 (1910).

The quoted statement of the court is in complete line with the Eierman case, supra, which sets forth the broad proposition that it is the best procedure to have all preliminary evidence ruled

on out of the presence of the jury, unless the preliminary evidence is clearly of a non-prejudicial character. The prejudicial nature of the evidence against Howard P. Carroll and H. Carroll & Co. becomes obvious when a conviction is before this Court that is not supported by competent or sufficient evidence.

E. There is not sufficient evidence to sustain the conviction of the Appellants on all counts.

The points raised by the Appellee require no answer. The broad statements of fundamental principles of law ignore the facts before this Court. An analysis of the evidence appears in the Appellants' brief (pp. 91-112). The Appellee states, without setting forth a citation to the record, that the charcoal brochure was materially false and that Howard P. Carroll paid for its preparation. No evidence exists to show that Howard P. Carroll had any connection with the preparation of the brown charcoal brochure, and the falsity of the statements in the charcoal brochure do not appear in the record.

It is respectfully submitted that manipulation was not charged and that the evidence before the trial court and the evidence before this Court is insufficient to sustain a conviction.

F. The trial court did commit prejudicial error in the admission of documentary evidence.

1. Exhibit 1.

Exhibit 1 is a carbon copy of six notes that David Alison

delivered to Archie Chevrier. The notes had nothing to do with the Denver escrow, as the Appellee urges. In fact, the notes were replaced with additional notes which were not in evidence. Marvin Greene, who was an attorney employed by the Securities and Exchange Commission, did not have any conversation with Howard P. Carroll relating to the notes which comprised Exhibit 1. No evidence tied Howard P. Carroll into the notes, and no evidence exists which would establish any connection between Howard P. Carroll or H. Carroll & Co. and David Alison or Archie Chevrier.

It is respectfully submitted that the notes were necessarily hearsay and that no proper foundation was offered for their admission.

2. Exhibit 22.

The record is silent as to the reason that the Securities and Exchange Commission sought information from J. Edward Fleischell. The Appellee has supplied, by way of conclusion, the purpose in stating that the Securities and Exchange Commission obtained the letter to determine the number of stock certificates and the number of shares in escrow in Denver, Colorado. No evidence establishes that the letter was kept in the ordinary course of business by the Securities and Exchange Commission. The only evidence which exists establishes that the letter was received as part of the investigative effort of the Securities and Exchange Commission (R. 462). It is impossible, in the light of the

record, to determine whether the information contained in Exhibit 22 is true or false, and for that reason alone the wisdom behind the formulation of the hearsay rule becomes apparent. No opportunity to cross-examine J. Edward Fleischell existed, and no foundation establishes any connection between J. Edward Fleischell and either of the Appellants who stood trial. Bisno v. United States, 299 F.2d 711 (9th Cir. 1961), does not support the admission of Exhibit 22, as the Appellee contends. In the Bisno case, supra, the letters in question came from the defendant's own file. In the instant case, we know not where the information contained in Exhibit 22 came from or how Mr. Fleischell obtained it. The exhibit is the rankest hearsay. Exhibit 27, moreover, does not fill the vacancy created by the inadmissibility of Exhibit 22. Exhibit 22 makes no reference whatsoever to an escrow or to Denver. The exhibit simply shows the certificate numbers, shares represented thereby, and the record holders shown on the certificates and relayed to Mr. Fleischell by some person or persons by means yet unknown. The total number of shares listed in Exhibit 22 is 495,266. Exhibit 27 (letter receipt from Securities Transfer Corporation to H. Carroll & Co.) shows only what certificates and the number of shares represented thereby which were in fact delivered by the Securities Transfer Corporation to H. Carroll & Co. The total number of shares of Comstock Ltd. stock so delivered and receipted for is far less

than the total number of shares listed on Exhibit 22. Exhibit 27 does mention the existence of an escrow without naming the parties to the escrow. No escrow agreement ever was presented, and no stock was ever traced to the escrow, other than by Exhibit 22. No evidence appeared which would establish that the shares of Comstock Ltd. received by H. Carroll & Co. from the Securities Transfer Corporation were in fact purchased by H. Carroll & Co., except in two isolated instances where payment was acknowledged. The remaining parts of Exhibit 27 merely show that H. Ward Dawson acknowledges receipt of payment for a certain number of shares and that such shares were delivered to H. Carroll & Co.

The Appellee, in contending that the admission of Exhibit 22 was harmless error, requires comment. In determining whether the error complained of was harmless or plain, the Appellants admit that the oft-quoted decision of Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946), is a landmark insofar as both Rule 52, F.R.Crim.P. and the Harmless Error States, 28 U.S.C. 2111, are concerned. The portion of the Kotteakos opinion which the Appellants feel points out the substantial nature of the right involved was quoted by the Eighth Circuit in Sanchez v. United States, 293 F.2d 260 (8th Cir. 1961), in considering objectionable hearsay testimony that furnished part of the government's evidence of a narcotics violation. In the Sanchez case, an informer's statement to a government agent out of the presence of

the defendant was admitted over a hearsay objection. In holding that the substantial rights of the defendant were prejudiced and that there was no requirement for defense counsel to continually object to the same class of testimony, the court quoted from Kotteakos v. United States, supra, and said:

> "'. . . The question is, not were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. Cf., United States v. Socony Vacuum Oil Co., supra (310 U.S. 150, at [pages] 239, 242) (60 S.Ct. 811, at pages 851, 853, 84 L.Ed. 1129), Bollenbach v. United States, supra (326 U.S. 607, at page 614), 66 S. Ct. 402, 406, 90 L.Ed. 350.
>
> "'This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened and one must judge others reactions not by his own but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.
>
> "'If when all is said and done the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra (308 U.S. 287) at [page] 294, (60 S.Ct. 198 at page 200, 84 L.Ed. 257). But if one cannot say with fair assurance after pondering all that happened, without stripping the erroneous action from the whole, that the judgment was not substantially swayed by error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether it was insufficient to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'"

"Applying the rules so well stated, we are not left with the conviction that the error did not influence the jury or that it had but slight effect." Sanchez v. United States, 293 F.2d 260, 267 (8th Cir. 1961).

In a counterfeiting case, United States v. Campanaro, 63 F. Supp. 811 (E.D. Pa. 1945), a treasury agent was allowed to testify that counterfeit obligations similar to those found in the possession of the defendant appeared in California, and the answer was not limited to facts within the agent's knowledge, but necessarily included hearsay. The prosecution urged that the admission of evidence pertaining to the discovery of similar counterfeit obligations in California was merely cumulative and harmless and did not prejudice the defendant. Judge Bard, however, held that intent to defraud was a crucial part ofthe government's charge and that it was pure conjecture to determine what evidence the jury looked to to find criminal intent. Therefore, the court found that the testimony complained of, which was hearsay in nature, was prejudicial to the defendant and not harmless.

In a subornination of perjury case, Culwell v. United States, 194 F.2d 808 (5th Cir. 1952), the court, in reviewing a contumacious effort by an attorney to sway a white slave prosecution by the procurement of false testimony, reviewed the record and reversed, saying:

"Considering the meagerness of the government's evidence and considering the effect that the errors had or reasonably may have had upon the jury's decision, we think the mass of inadmissible testimony must have had a

substantial, prejudicial effect on the jury. In any event, we are unable to say that the errors did not influence the jury or that they had but slight effect. Kotteakos v. United States, 328 U.S. 750, 764, 66 S. Ct. 1239, 90 L.Ed. 1557." Culwell v. United States, 194 F.2d 808, 810.

No evidence appears in the record that would take the place of Exhibit 22. Therefore, it is submitted that the error committed in the admission of Exhibit 22 not only prejudiced the defendants, but also caused the defendants to suffer a conviction on the rankest of hearsay.

3. Exhibits 28, 29, 30, and 31.

The Appellants' opening brief fully covers the contentions raised by the Appellee (Point Two, p. 37). Unless Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958), is to be totally emasculated and overruled, the admission of Exhibits 28, 29, 30, and 31 constitutes plain error and requires reversal or dismissal.

4. Exhibits 18 and 104.

The inadmissibility of Exhibits 18 and 104 was fully dealt with in the Appellants' opening brief (Point Two, p. 40). The best that the Appellee could offer this Court for the admission of Exhibit 18 was the so-called testimony of Liboslav Uhlir that similar confirmations crossed his desk while he was at H. Carroll & Co.

As to Exhibit 104, the government only had Gaither Loewenstein, who saw the scraps called business records that William Ziering obtained from Archie Chevrier in the basement of the

San Francisco Mining Exchange. The manner in which the records were kept and a foundation that would tie Howard P. Carroll or H. Carroll & Co. to Exhibits 18 and 104 was totally lacking. The Appellee would have this Court believe that the Business Records as Evidence Act (28 U.S.C. 1732) and Bisno v. United States, 299 F.2d 711 (9th Cir. 1961), grant carte blanche authority for the admission of any documentary evidence. Such is not the case. Niederkrome v. C.I.R., 266 F.2d 238 (9th Cir. 1958); Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L.Ed. 645, 144 A.L.R. 719 (1943); Standard Oil Company v. Moore, 251 F.2d 188 (9th Cir. 1957).

It is respectfully submitted that Exhibits 18 and 104 were improperly admitted.

5. Exhibits 105 and 106.

The fallacy which is apparent in the Appellee's argument on the admission of Exhibits 105 and 106 becomes apparent when considered in the light of the record. Exhibit 105, according to Howard Sillick, was prepared from Exhibit 22 and from the Nevada Transfer Agency records (Exhibits 28, 29, 30, and 31; R. 741).

Inaccuracies appearing in any summary are not for the consideration of the jury and are not subject to correction by cross-examination. If the summary is inaccurate, it should not be admitted. Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954).

Corbett v. United States, 238 F.2d 557 (9th Cir. 1956), recognizes the right of an expert to summarize other evidence in a proper case, provided that procedural safeguards are observed and provided further that the jury is properly instructed as to the basis upon which the testimony and charts are admitted to explain the primary evidence. A fortiori, if the proper procedural safeguards are not applied, the evidence is inadmissible. Noell v. United States, 183 F.2d 334, cert. den. 340 U.S. 921 (9th Cir. 1950). Applying the Court's reasoning in both the Noell and Corbett cases, we come up with the conclusion that the Appellee is contending that Mr. Sillick's testimony was merely a summary of evidence which was incompetent or not in evidence at all.

G. The trial court did commit error in its Instructions to the jury.

The instructions when read as a whole show the demeanor of the trial court, and although inflection and the manner of delivery do not appear in the cold printed record, prejudice is created. The court's colloquy with counsel, as set forth in the opening brief, poignantly displays the error complained of and the prejudice which resulted to the defendants.

CONCLUSION

It is respectfully submitted that the conviction and sentence against the Appellants should be set aside and the case dismissed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this Reply Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Reply Brief is in full compliance with those rules.

W. H. ERICKSON

NO. 18551

United States Court Of Appeals

NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

Appeal from the United States District Court for the
Southern District of California,
Central Division

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 18551

HOWARD P. CARROLL and H. CARROLL & CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

TO THE HONORABLE

CIRCUIT JUDGE BARNES,
CIRCUIT JUDGE DUNIWAY, and
DISTRICT JUDGE PENCE.

Appellants, Howard P. Carroll and H. Carroll & Co., hereby petition for a rehearing to reconsider the judgment entered in this action on December 10, 1963, on the following grounds:

1. This Court has declared that the admission of Exhibit 2 (Fleishchell's letter to the Securities and Exchange Commission) was error, but has declared that the admission of the said Exhib was not prejudicial error (Opinion, pp. 9 and 10).

2. This Court has further held that it was error to admit Exhibit 105 (Sillick's summary of Exhibit 22 and the records of the Nevada Transfer Agency (Exhibits 28, 29, 30 and 31)),

insofar as Exhibit 105 related to the Wisda and Johnson counts of the indictment (Opinion, pp. 10 and 11).

3. The Bloemsma count of the indictment must also be considered as not supported by evidence when the record is considered. The Assistant United States Attorney admitted that Arnold Bloemsma had no present recollection of any representation of any kind and no testimony was offered to support the Bloemsma sale (Tr. 600).

4. Prejudice to the Appellants from the admission of Exhibit 22 appears because defense counsel could not properly cross-examine Sillick as to Exhibit 105 without knowing the basis upon which he made his summary.

5. The effect of the admission of Exhibit 105 on the jury can only lead to speculation. Exhibit 27 (receipts signed by an employee of H. Carroll & Co. acknowledging delivery of stock to that company from Securities Transfer Corp.) cannot supply the missing link in the preparation of Exhibit 105 when Exhibit 22 is lost, for Exhibit 27 merely establishes the receipt of shares of stock of Comstock, Ltd. without establishing the previous owner of such shares. Previous ownership in itself, as established by Exhibits 28, 29, 30, and 31, is without significance or effect when no right can be established, in the absence of Exhibit 22, to purchase particular shares from

particular persons at established prices. Actual purchases are especially insignificant and bear on the inadmissibility of Exhibit 105 when considering time lapse between deliveries and subsequent sales of shares, regardless of their source, purchase price, or sales price.

6. At the time Exhibit 105 was offered, the Court questioned the Assistant United States Attorney about the purpose of Exhibit 105, and the following colloquy (Tr. 744) shows the keynote quality of Exhibit 105:

> "THE COURT: Well, counsel, I -- what's the purpose of this chart? [Ex. 105.]
>
> "MR. MITCHELL: To show the origin of the stock purchased by the investor witnesses named in the six counts and the two other investor witnesses who have testified at this trial.
>
> "THE COURT: Do you have to do that by chart?
>
> "MR. MITCHELL: Yes, your Honor.
>
> "THE COURT: Why? Doesn't the record itself show it?
>
> "MR. MITCHELL: No, your Honor, it does not trace it, the stock cannot be traced back to the particular shares shown in Exhibit 22 on the record alone.
>
> "THE COURT: Wait a minute, counsel. Are you saying that -- you have marched yourself right into a trap that I am afraid you will never get out of. Are you saying that this witness is going to present evidence that is not in this case?
>
> "MR. MITCHELL: No, I'm saying that it is not possible

7. In order to prepare Exhibit 105, Howard Sillick admitted that Exhibit 22 was used (Tr. 747), information was obtained from Ziering (Tr. 765), and that additional information was obtained by Sillick after inquiry was made by letter to the Nevada Transfer Agency (Tr. 772).

8. The trial judge noted that Exhibit 105 was prepared from matters not in evidence, and the witness, Howard Sillick, was instructed to take the biggest pencil he could find and mark out the transaction that related to his letter inquiry to the Nevada Transfer Agency (Tr. 774). No part of Exhibit 105 was ever stricken by Howard Sillick.

9. The record relating to Exhibit 105 establishes that all of the court's comments and the testimony relating to matters not in evidence were presented to the jury (Tr. 745).

10. If Exhibit 22 was improperly admitted, the admission of any other Exhibit, such as Exhibit 105, which depended on Exhibit 22 for its foundation, must necessarily be error as to all counts.

11. The prejudicial nature of the error also appears from the fact that Exhibit 105, as admitted, gave a badge of authenticity to Exhibit 22.

12. To allow one part of an exhibit to stand after part of the exhibit has been made known to the jury is difficult, if

It is respectfully submitted that this Court, in considering the numerous errors complained of, has recognized the problems which confronted the Appellants' defense counsel, and that the cumulative effect of the errors complained of was such that the conviction, sentences and fines imposed on both Appellants as to the counts this Court has upheld should be set aside and a new trial ordered as to those counts.

Undersigned counsel certify that this petition is not interposed for delay and that in their judgment it is well founded.

Dated: January 3, 1964.

Respectfully submitted,

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No. 18551

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD P. CARROLL and H. CARROLL & Co.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18551

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

To the Honorable Stanley N. Barnes, Benjamin Cushing Duniway and Martin Pence:

The United States of America, Appellee herein, pursuant to Rule 23 of this Court, respectfully petitions for rehearing of that portion of this Court's judgment of December 10, 1963, which reversed the convictions under Counts One, Five and Six of the indictment on the ground that these Counts were barred by the statute of limitations [Slip Op., pp. 20-21]. This Court's opinion makes clear that it reached the conclusion that a mailing occurring after the victim has paid for the securities cannot be utilized in determining when the statute of limitations has run—

(1) by failing to recognize that the offense charged, a scheme to defraud under Section 17(a) of the Securities Act of 1933, is a continuing offense;

(2) by apparently assuming (a) that a violation of section 17(a) has not been committed until payment has been made by the victim and (b) that the completion of the offense can occur before there has been any use of the mails; and

(3) by failing to consider the "lulling" theory, recognized by holdings of the Supreme Court and of this and other courts of appeals, that any use of the mails designed to reassure victims of a fraudulent scheme is a part of the offense.

Unfortunately, none of these propositions was developed in our brief.

1. This Court Failed to Recognize That the Offense Charged, a Scheme to Defraud, Is a Continuing Offense.

We believe that this Court failed to realize the significance of the fact that the indictment charges a scheme to defraud and not just a fraudulent sale. A scheme to defraud is a continuing offense, since, as this Court has stated, it demands "continuity", *Cacy v. United States,* 298 F. 2d 227, 230 (C. A. 9, 1961).[1] Even *Pendergast v. United States,* 317 U. S. 412 (1943), cited by this Court in the present case for the proposition "That the statute of limitations begins to run when an offense is completed" [Slip Op. p. 21] makes clear that a fraudulent scheme is "a continuous offense" and indicates that normally the statute of limitations begins to run "only after the latest act in the execution of the scheme." *Id.* at 419-420.

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[1]Here, as in *Cacy,* 298 Fed. 227, 230 (C. A. 9, 1961). The scheme described in the indictment was not limited to obtaining the purchase price from any particular purchaser."

2. This Court Apparently Assumed (a) That a Violation of Section 17(a) Has Not Been Committed Until Payment Has Been Made and (b) That the Completion of the Offense Can Occur Before There Has Been Any Use of the Jurisdictional Means.

In its opinion this Court approved appellants' position "That once the sale is made and completed by offer, acceptance and payment, the crime has been completed, and that the use of the mails thereafter to send the stock certificates, the only occurrence involved in these three counts that occurred within the period of limitations, merely provides the requisite federal jurisdictional basis" [Slip Op. pp. 20-21].

Thus, this Court assumed that no violation of Section 17(a) can be committed until offer, acceptance and payment have occurred. Yet it is clear from the statutory language that fraud in either the offer or the sale of securities is punishable.[2] Thus a fraudulent offer using the mails would constitute a violation, even though there had been no acceptance or payment. But surely, if the indictment were returned within five years of an acceptance or payment by mail, but more than five years subsequent to the mailing in which the offer occurred, the indictment would be timely.

The Court also seemed to assume that an offense under Section 17(a) can be completed before there has been any use of the jurisdictional means (mails or interstate commerce). If this view were correct, the statute of limitations would start running before any offense had been committed, for the use of the mails or interstate commerce is an essential element of any offense under Section 17(a).

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[2]*Cf. Bobbroff v. United States,* 202 F. 2d 389, 391 (C. A. 1953).

3. This Court Failed to Consider the "Lulling" Theory Recognized by Holdings of the Supreme Court and of This and Other Courts of Appeals That Any of the Mails Designed to Reassure Victims of a Fraudulent Scheme Is a Part of the Offense.

This Court's holding that the statute of limitations runs from the date of payment is inconsistent with the line of cases holding that "lulling" letters designed to reassure the victims of a fraudulent scheme are part of the offense. Thus in *United States v. Wernes,* 157 F. 2d 797, 799 (C. A. 7, 1946), which like the present case involved a prosecution under Section 17(a) of the Securities Act, the Court rejected the defense contention that the statute of limitations runs from the date of payment and held instead that it ran from the mailing of lulling letters subsequent to the payment of the purchase price. Even under the mail fraud statute, which this court found analogous in citing *Kann v. United States,* 323 U. S. 88 (1944) [Slip Op. p. 21], the mailing of lulling letters subsequent to the date of payment has been held by the Supreme Court and by this Court to provide the basis for an indictment. *United States v. Sampson,* 371 U. S. 75 (1962); *Cacy v. United States,* 298 F. 2d 227, 230 (C. A. 9, 1961).

In the present case the delivery of the stock certificates was essential to the successful fruition of the fraudulent scheme. If lulling letters are sufficient to constitute a part of a fraudulent scheme, then *a fortiori,* the delivery of the stock certificates which are the subject of the scheme must be a part of it. So far as we are aware no distinction has ever before been drawn

between a part of the scheme "for jurisdictional purposes" and for purposes of extending the running of the statute of limitations. No basis can be found for such distinction in the definitions of the Securities Act, which defines "sale" in Section 2(3), 15 U. S. C. §77b(3), to "include every contract of sale or *disposition of a security* . . . for value." (Emphasis supplied.)[3]

Respectfully submitted,

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Attorneys for Appellee.

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[3]The delivery of a stock certificate constitutes a "disposition" of the security within this definition. *Schillner v. H. Vaughan Clarke & Co.,* 134 F. 2d 875, 877 (C. A. 2, 1943). See also *United States v. Monjar,* 147 F. 2d 916, 920 (C. A. 3, 1944), cert. den. 325 U. S. 859 (1945); *Blackwell v. Bentsen,* 203 F. 2d 690 (C. A. 5, 1953), *petition for cert. dismissed,* 347 U. S. 925 (1954). In the latter case the Court commented that the "Delivery of the . . . [securities] is an integral part of the sale." 203 F. 2d at 693.

Certificate of Counsel.

John A. Mitchell, an Assistant United States Attorney and a member of the Bar of this Court and attorney of record for appellee herein, herewith certifies that this Petition for Rehearing is in his judgment well founded and is not interposed for delay.

Dated: January 8, 1964.

JOHN A. MITCHELL